Supreme Court, U.S.
FILED

001934 JUN 24 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC., MERIT LIFE INSURANCE CO., and YOSEMITE INSURANCE COMPANY,

Petitioners

v.

MABLE BRANCH,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. RUTHERFORD
F. A. FLOWERS, III*
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*

85 pp

QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court correctly held that the issue of unconscionability of an arbitration agreement governed by the Federal Arbitration Act ("FAA") should be determined by the court rather than the arbitrator, when the arbitration agreement itself states in clear and unmistakable terms that all issues of arbitrability are to be resolved by the arbitrator?

2. Whether the judgment of the Alabama Supreme Court violates the FAA and this Court's previous rulings that arbitration agreements cannot be singled out for suspect status, when the court below: (a) ignored two factors relating to unconscionability that it normally considers in the non-arbitration context, (b) created two new "indicia" of unconscionability that can apply only to arbitration agreements, and (c) considered a third factor that it has never used to invalidate any other contractual provision and that is contrary to the FAA's objectives of promoting the widespread use of arbitration agreements?

LIST OF PARTIES AND INFORMATION REQUIRED BY RULE 29.6

All parties are listed in the caption. The ultimate parent company of the three petitioners is American General Corporation, a corporation publicly traded on the New York Stock Exchange. No publicly held company other than American General Corporation owns 10% or more of the stock of any of the petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND INFORMATION REQUIRED BY RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
TABLE OF APPENDICES	ix
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Parties' Arbitration Agreement	3
B. Proceedings In The Trial Court	4
C. Proceedings In The Alabama Supreme Court	6
REASONS FOR GRANTING THE WRIT	9
I. The Court Below Decided An Important Question Of Federal Law Completely At Odds With This Court's Decision In *First Options Of Chicago, Inc. v. Kaplan*	10

TABLE OF CONTENTS (continued)

Page

II. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With An Unbroken Line Of Decisions Of This Court. 14

III. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With Decisions Of The Second And Seventh Circuit Courts Of Appeals On The Same Issue 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: *Page(s)*

Abram Landau Real Estate v. Benova, 123 F.3d 69 (2d Cir. 1997) 12

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 1, 3, 15, 16, 17, 21

AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 10

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 20

Cavalier Mfg., Inc. v. Jackson, No. 1000391, 2001 WL 367600 (Ala. Apr. 13, 2001) 14

Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350 (11th Cir. 1986) 12

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 15, 17, 20, 23, 25

Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999) 19, 22, 23

Ex parte Alabama Oxygen Co., 433 So. 2d 1158 (Ala. 1983), *vacated, York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984) 3, 16

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ..... *passim*

Fleming Farms v. Dixie Ag Supply, Inc., 631 So. 2d 922 (Ala. 1994) 19

TABLE OF AUTHORITIES (continued)

Page(s)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 20, 24

Glass v. Kidder Peabody & Co., 114 F.3d 446 (4th Cir. 1997) 12

Green Tree Financial Corp. - Alabama v. Randolph, 121 S. Ct. 513 (2000) 18, 20

Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999) 24, 25

Layne v. Garner, 612 So. 2d 404 (Ala. 1992) 16

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 17, 18, 21, 22

National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129 (2d Cir. 1996) 12

PaineWebber, Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996) 12

PaineWebber, Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990) 12

Perry v. Thomas, 482 U.S. 483 (1987) 15, 17, 19, 20, 22, 23

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 9, 12, 14

TABLE OF AUTHORITIES (continued)

Page(s)

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 19

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 17

Southland Corp. v. Keating, 465 U.S. 1 (1984) 15, 27, 20, 22

Southland Farms, Inc. v. Ciba-Geigy Corp., 575 So. 2d 1077 (Ala. 1991) 19

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) 10

United Food & Commercial Workers Union v. Lucky Stores, Inc., 806 F.2d 1385 (9th Cir. 1986) 12

Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 18

Washington-Baltimore Newspaper Guild v. Washington Post, 959 F.2d 288 (D.C. Cir. 1992) 13

We Care Hair Dev., Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999) 23

Wilson v. World Omni Leasing, Inc., 540 So. 2d 713 (Ala. 1989) 24

TABLE OF AUTHORITIES (continued)

Page(s)

United States Constitution:

U.S. Const. art. VI, cl. 2 2

Statutes:

9 U.S.C. §§ 1 *et seq.* 5

9 U.S.C. § 2 ..... 2, 13, 14, 15, 23

9 U.S.C. § 4 13

9 U.S.C. § 16(a)(1) 6

28 U.S.C. § 1257(a) 1

Miscellaneous:

1 *Corbin on Contracts* § 1.4 (rev. ed. 1993) 20

Henry C. Strickland, "The Federal Arbitration Act's Interstate Commerce Requirement: What's Left For State Arbitration Law?" 21 *Hofstra L. Rev.* 385 (1992) 21

TABLE OF APPENDICES

Page

OPINIONS OF THE SUPREME COURT OF ALABAMA DATED AND FILED DECEMBER 22, 2000 ..... 1a

PER CURIAM OPINION OF THE SUPREME COURT OF ALABAMA OVERRULING APPLICATION FOR REHEARING DATED AND FILED MARCH 30, 2001 ..... 35a

CERTIFICATE OF JUDGMENT OF AFFIRMANCE OF THE SUPREME COURT OF ALABAMA DATED DECEMBER 22, 2000 ... 38a

ORDER OF THE CIRCUIT COURT FOR HALE COUNTY, ALABAMA ON MOTIONS TO COMPEL ARBITRATION DATED JANUARY 24, 2000 AND FILED JANUARY 31, 2000 ... 39a

Petitioners, American General Finance, Inc., Merit Life Insurance Co., and Yosemite Insurance Company, respectfully request this Court to issue a writ of certiorari to review the judgment of the Alabama Supreme Court entered in this action on December 22, 2000.

OPINIONS AND ORDERS BELOW

The majority and dissenting opinions of the Alabama Supreme Court are designated for publication but are not yet reported. The court's opinions are reproduced in the Appendix at pages 1a-34a. The memorandum opinion and order of the Circuit Court of Hale County, Alabama are not reported. They are reproduced in the Appendix at pages 39a-48a.

JURISDICTION

The judgment sought to be reviewed was dated and entered on December 22, 2000. (App. 38a). Petitioners filed a timely application for rehearing, which the Alabama Supreme Court denied by an order dated and entered on March 30, 2001. (App. 35a-37a). This petition for a writ of certiorari is being filed within 90 days from the date petitioners' application for rehearing was denied. Both federal questions presented by this petition were properly and timely raised in the trial court and in the Alabama Supreme Court. (App. 2a; 15a; 40a). Both courts ruled on these questions on the merits. (App. 20a-21a; 28a; 44a; 48a). This Court therefore has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(a). *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The constitutional provision involved in this case is known as the Supremacy Clause and is contained in Article VI of the Constitution of the United States. The Supremacy Clause reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The statutory provision involved is § 2 of the Federal Arbitration Act of 1925, 43 Stat. 883, as amended, which is presently codified at 9 U.S.C. § 2. Section 2 of the Federal Arbitration Act reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The Alabama Supreme Court's decision in this case is the latest in a long line of its decisions grounded in a general anti-arbitration bias which this Court has consistently condemned. *See, e.g., Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983), *vacated, York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984); *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993), *rev'd*, 513 U.S. 265 (1995). The court below held that the issue of unconscionability of an arbitration agreement governed by the Federal Arbitration Act is an issue for the court rather than the arbitrator, even though the arbitration agreement itself states on its face in clear and unmistakable terms that *all* issues of arbitrability are to be resolved by the arbitrator. (App. 21a). After taking this issue from the arbitrator, the court then held that the parties' arbitration agreement was unconscionable. The court below reached this conclusion only after singling out the arbitration provision for suspect status by ignoring factors it normally considers in deciding unconscionability challenges, creating new factors that can apply only in the arbitration context, and focusing on a third factor (prevalence of arbitration agreements in the marketplace) that is completely inconsistent with Congress' objectives of promoting the widespread use of arbitration agreements. (App. 22a; 28a). The court's decision arose from the following events.

A. The Parties' Arbitration Agreement.

Respondent, Mable Branch, obtained three separate loans from petitioner American General Finance, Inc. ("American General") on July 3, 1996, October 18, 1996, and November 21, 1997, respectively. (App. 2a). Respondent executed a Note and Security Agreement in connection with each loan. Each Note and Security Agreement contains an arbitration agreement, which is identical in all three loan agreements.

The arbitration agreement states that "*all* claims, disputes, or controversies, of every kind and nature . . . *shall* be resolved by arbitration." (App. 2a; R. 96; 98; 101) (emphasis added). The agreement also expressly provides on its face, in clear and unambiguous terms, that "Borrower(s) and Lender further agree that *all* issues and disputes as to the *arbitrability* of claims *must also* be resolved by the *arbitrator*." (App. 3a; R. 96; 98; 101) (emphasis added).

The parties' arbitration agreement is contained on the front page of each Note and Security Agreement. (R. 96; 98; 101). The arbitration agreement is entitled **"ARBITRATION OF CLAIMS AND WAIVER OF JURY TRIAL."** (*Id*). Respondent signed her name on each Note and Security Agreement immediately below the following acknowledgment:

> **You further acknowledge that you have read, and agree to all terms and provisions of the Arbitration of Claims and Waiver of Jury Trial.**
>
> **IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.**
>
> /s/ Mable H. Branch
> Signature of Principal Borrower

(R. 96; 98; 101).

B. Proceedings In The Trial Court.

Ignoring the clear and unambiguous arbitration agreement contained in all three loan agreements which she signed, respondent filed this action against petitioners in the Circuit Court of Hale County, Alabama, on June 15, 1998.

(App. 5a; R. 11-36). In her complaint, as amended, respondent asserted claims for fraudulent suppression, negligence, wanton misconduct, money had and received, unjust enrichment, outrage, flipping (improper financing), a violation of § 5-19-3 of the Code of Alabama, 1975, and unconscionability against all three petitioners. (App. 5a; R. 15-35; 140-41).

Petitioners denied the material allegations contained in respondent's complaint, as amended, and asserted various affirmative defenses. (R. 43-81). Petitioners expressly asserted in their answer that "[p]laintiff is precluded from proceeding in a judicial forum because she agreed to arbitrate her claims. The agreement by the parties to arbitrate their disputes is specifically enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*" (R. 79). Petitioners also filed a motion to stay proceedings, including discovery, and to compel arbitration of respondent's claims pursuant to the provisions of the Federal Arbitration Act ("the FAA" or "the Act"). (App. 5a; R. 82-94; 132-36). Respondent opposed petitioners' motion for a stay and to compel arbitration on various grounds. (R. 142-49; 168-92).

The trial court denied petitioners' motion to stay and to compel arbitration on January 31, 2000. (App. 5a-6a; 39a-48a). The trial court held that "[t]he issue of unconscionability is a question of law for the court." (App. 44a). The court then held that "the provisions of the subject contracts which purport to require arbitration of the disputes arising out of those contracts are unconscionable as a matter of law. . . . void, and of no force and effect." (App. 48a). But, the court concluded, "[w]hereas substantial injustice would occur to the defendants if they could not otherwise enforce their contracts, the court specifically addresses only the arbitration provisions, leaving in place all other rights and remedies of the parties that may exist under the law and the contract." (App. 48a). Petitioners then

appealed the trial court's order to the Alabama Supreme Court pursuant to 9 U.S.C. § 16(a)(1). (App. 2a; R. 1045-48).

C. Proceedings In The Alabama Supreme Court.

The Alabama Supreme Court issued its decision on December 22, 2000. (App. 1a).[1] Five justices voted to affirm the trial court's order denying petitioners' motion to stay and to compel arbitration of respondent's claims, and four justices voted to reverse the trial court's order. (App. 2a; 29a). Chief Justice Hooper and Justice See issued dissenting opinions. (App. 30a-34a).

The majority correctly held that the FAA applied to the parties' arbitration agreement because: (1) respondent Branch signed a written contract containing an arbitration clause; (2) the parties' contract substantially affects interstate commerce; and (3) all of respondent's claims fall within the scope of the claims the parties agreed to submit to arbitration. (App. 2a; 18a-20a; 22a). The majority then turned to the question of whether the court or the arbitrator should determine in the first instance whether the arbitration agreement itself was unconscionable. (App. 20a).

The majority concluded that this question — "whether the arbitration clause itself is unconscionable" — fell within the scope of the clause providing that "the arbitrator is to decide the threshold issues of arbitrability." (App. 20a). Nevertheless, completely at odds with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938

---

1. The court's opinion disposed of two cases that previously had been consolidated on appeal: *American General Finance, Inc. v. Branch*, No. 1990887, and *American General Finance, Inc. v. Reaves*, No. 1990888. (App. 1a-2a). The court reversed the trial court's order denying petitioners' motion to stay and to compel arbitration in *Reaves*. (App. 2a; 29a).

(1995), the majority held that the trial court did not err "in holding that it [as opposed to the arbitrator] would determine whether the arbitration clauses are unconscionable." (App. 21a). The majority so held even though it expressly recognized earlier in its opinion, in two separate places, that the parties' arbitration agreement expressly provides that " 'Borrower(s) and Lender further agree that *all* issues and disputes as to the *arbitrability* of claims *must also* be resolved by the *arbitrator*,' " and that the question of unconscionability was a threshold issue of arbitrability. (App. 3a; 5a; 20a) (emphasis added). *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 943 ("parties may agree to arbitrate arbitrability").

Proceeding from its original error, the majority then held that the arbitration agreement before it was "unconscionable and unenforceable." (App. 28a). The court, however, either failed to apply or misapplied the traditional factors it routinely uses in determining whether a contractual provision is unconscionable. Instead, the majority singled out the parties' arbitration agreement for suspect status, basing its decision of unconscionability on arbitration provisions and policies repeatedly approved by this Court and never before used by the court to strike down a contractual provision as unconscionable. The majority concluded that "[t]he first indicium of unconscionability is the breadth of the clause." (App. 22a). The majority also concluded that "[a] second indicium of unconscionability is the provision purporting to invest the arbitrator with the threshold issues of arbitrability." (App. 22a).

The third indicium of unconscionability, the majority stated, was an alleged "lack of mutuality of remedy." (App. 22a-23a). Finally, the majority concluded that respondent "had no meaningful choice" to obtain a loan without having to sign an arbitration agreement, even though it acknowledged in its opinion that at least

"1 or 2 companies," in addition to American General, provided loans without requiring the borrower to agree to arbitrate disputes. (App. 27a). It is clear from the majority's opinion that its finding that respondent "had no meaningful choice" is based solely on American General's superior "bargaining power" and the prevalence of arbitration provisions throughout the consumer lending market generally. (App. 25a-27a). "For these reasons," the majority stated, "we conclude that the trial court did not err in holding the arbitration provisions in Branch's contract to be unconscionable and unenforceable. The order . . . is affirmed." (App. 28a).

Chief Justice Hooper dissented from the majority's decision that the trial court, rather than the arbitrator, properly resolved the threshold question of unconscionability, as well as the majority's finding of unconscionability. (App. 30a-32a). With respect to the question of *who* should decide the question of unconscionability, Chief Justice Hooper, relying on this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, *supra*, wrote in part as follows:

> Branch's agreement to submit the arbitrability question to the arbitrator could not be any clearer. This clause is in no way ambiguous, and it is highlighted in bold print. The most cursory glance at this contract would reveal something special about that clause even to the laziest consumer eye. The questionable determination of unconscionability should not trump the arbitrability clause.

(App. 32a).[2]

---

2. With respect to the issue of unconscionability itself, Chief Justice Hooper wrote that portions of the record (which the majority (Cont'd)

Petitioners timely filed an application for rehearing with the Alabama Supreme Court on January 5, 2001. The court below, on March 30, 2001, issued its decision on petitioners' rehearing application. (App. 35a-37a). Five justices voted to deny rehearing and four justices dissented, but this time with a different line-up. (App. 36a). In his special concurrence on rehearing, Justice Lyons wrote that the interplay between this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and its decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which held that challenges to the contract "as a whole" are for the arbitrator to decide, was unclear. (App. 36a-37a). Justice Lyons reasoned that "[w]e should not extend *First Options* beyond the context of the issues presented in that case, without some statement from the United States Supreme Court as to the continued precedential value of *Prima Paint*." (App. 37a).

REASONS FOR GRANTING THE WRIT

The court below decided two interlocking, important issues under the Federal Arbitration Act. In holding that the issue of unconscionability of the parties' arbitration agreement was an issue for the court rather than the arbitrator to decide, the court below decided an important question of federal law completely at odds with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938

(Cont'd)
apparently ignored) contained ample evidence that respondent did indeed have "meaningful choices with respect to obtaining a loan that did not contain an arbitration clause." (App. 30a n.6). Justice See also dissented, stating that respondent "had previously negotiated a loan with the First Bank of Linden, and the documents supporting that transaction did not contain an arbitration provision." (App. 33a n.7). Justice See also pointed out that respondent "presented no evidence indicating that she shopped around before borrowing from American General." (App. 34a).

(1995). In holding that the parties' arbitration agreement was unconscionable, the court decided an important question of federal law in direct conflict with at least four decisions of this Court, as well as decisions from the Second and Seventh Circuit Courts of Appeals.

I. The Court Below Decided An Important Question Of Federal Law Completely At Odds With This Court's Decision In *First Options of Chicago, Inc. v. Kaplan*.

It is well settled that it is ordinarily "for the court, not the arbitrator, to decide in the first instance whether [a] dispute [is] to be resolved through arbitration." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651 (1986). Parties to an arbitration agreement have the opportunity to obtain an advance judicial determination of arbitrability issues because arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 648. This Court's precedents are equally clear, however, that "the parties [may] exclude[ ] from court determination not merely the decision of the merits of [a dispute] but also the question of its arbitrability, vesting power to make both decisions in the arbitrator." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 n.7 (1960).

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court considered the question whether the trial court or the arbitrator should decide "the arbitrability of the dispute" between the parties, which in that case involved the question whether the Kaplans agreed to arbitrate at all. 514 U.S. at 941-42. The Court stated that the answer to this question — "the 'who' question" — "is fairly simple." *Id.* at 943. The Court explained that the analysis to be used in deciding this question is the same one used in determining whether the parties agreed to arbitrate the merits of a particular claim or controversy: "Just as the arbitrability of

the *merits* of a dispute depends upon whether the parties *agreed* to arbitrate that dispute," the answer to the question of who should decide questions as to the validity or enforceability of the arbitration agreement itself likewise "turns upon what the *parties agreed* about *that* matter." *Id.* at 943 (emphasis in original and added in part).

The Court held that the "parties may agree to arbitrate arbitrability" where, as here, "there is clear and unmistakable evidence that they did so." *Id.* at 943-44. (*See* App. 3a ("Borrower(s) and Lender further agree that *all* issues and disputes as to the *arbitrability* of claims *must also* be resolved by the *arbitrator*")) (emphasis added). This is so because the question whether the "parties agree[d] to submit the arbitrability question itself to arbitration," like other issues involving arbitration, "is simply a matter of contract between the parties" that depends upon whether "the parties objectively revealed an intent to submit the arbitrability issue to arbitration" in their agreement. *Id.* at 943-44. The parties clearly did so here. (App. 3a).[3]

The decision by the court below is completely at odds with this Court's decision in *First Options*. The majority correctly concluded that the question "whether the arbitration clause itself is unconscionable" fell within the scope of the clause providing that "the arbitrator is to decide the threshold issues of arbitrability." (App. 20a).[4] But the court below held

---

3. In addition to specifically providing in their arbitration agreement that "all" issues of arbitrability "must also be resolved by the arbitrator," the parties expressly incorporated into their agreement the Commercial Rules of the American Arbitration Association. (App. 3a). Rule 8(a) of the Commercial Rules grants the arbitrator the power to rule on "the existence, scope or *validity* of the arbitration agreement." (R. 399) (emphasis added).

4. The federal courts of appeals agree that "issues of (Cont'd)

that the issue of the enforceability of the parties' agreement to arbitrate was a question for the trial court, rather than the arbitrator, even though "there is clear and unmistakable evidence" in the parties' agreement that "the parties agreed to arbitrate arbitrability." *First Options*, 514 U.S. at 944. The decision below simply cannot be squared with this Court's decision in *First Options*.

The majority's holding that "[w]here the attack is addressed to the arbitration clause itself, as opposed to the contract as a whole, the court, and not the arbitrator, resolves the issue" (App. 20a-21a), is fundamentally flawed for an additional reason. When the attack is directed to the contract "as a whole," the arbitrator resolves those challenges, even in the absence of a *First Options* clause, under this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Indeed, the only approach that makes sense and harmonizes both *Prima Paint* and *First Options* is the following:

1. If the challenge goes to the "contract as a whole," the arbitrator decides the issue under the *Prima Paint* doctrine. *See also Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("claims alleging

---

(Cont'd)
arbitrability" include: (1) the existence, validity or enforceability of the arbitration agreement itself; and (2) whether a particular claim or dispute falls within the scope of the claims the parties agreed to submit to arbitration. *See, e.g., Abram Landau Real Estate v. Benova*, 123 F.3d 69, 72 (2d Cir. 1997); *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996); *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990); *United Food & Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986).

unconscionability, coercion, or confusion in signing the agreement generally should be determined by an arbitrator because those issues go to the formation of the entire contract");

2. If the challenge goes to the arbitration clause specifically, the trial court decides the issue, *AT & T Technologies, Inc. v. Communications Workers*, *supra*, UNLESS

3. There exists *First Options* language in the agreement that clearly assigns arbitrability issues to the arbitrator. *See, e.g.*, *United Food & Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1385 (9th Cir. 1986) (collective bargaining agreement providing that "all issues of arbitrability are to be decided 'in the first instance' by the arbitrator").

This Court's prior decisions make plain that where, as here, the parties choose to submit all issues of arbitrability to the arbitrator in the first instance, instead of using one of the methods provided in the Act to secure an initial judicial determination on such threshold questions, the issue is for the arbitrator rather than the court to decide. *First Options*, *supra*; *Steelworkers v. Warrior & Gulf Nav. Co.*, *supra*. *See also Washington-Baltimore Newspaper Guild v. Washington Post*, 959 F.2d 288, 291 (D.C. Cir. 1992). The court below, however, has rendered the *First Options* doctrine a complete nullity. The decision below is also flatly inconsistent with the plain language of the FAA that arbitration agreements are "valid, irrevocable, and enforceable," and that "the court *shall* make an order directing the parties to proceed to arbitration in *accordance with the terms of the agreement*." 9 U.S.C. §§ 2, 4 (emphasis

added). *See generally First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contract between the parties").

We believe that *First Options* is entirely consistent with *Prima Paint*. But Justice Lyons questioned "the continued precedential value of *Prima Paint*" in his special concurrence on rehearing. (App. 37a). Only this Court can clarify whether *Prima Paint* can be read to hold that the issue of unconscionability of an arbitration provision is always a question for the court, even when a *First Options* clause is present.

Finally, arbitration agreements containing *First Options* language are becoming more and more prevalent. The *First Options* issue presented by this case is an important one because the decision below calls into question the validity of every arbitration clause containing *First Options* language, at least in Alabama. This issue is also a recurring one. *See Cavalier Mfg., Inc. v. Jackson*, No. 1000391, 2001 WL 367600, at *4 (Ala. Apr. 13, 2001) ("as this court explained in *American General Finance, Inc. v. Branch*, issues concerning the validity of arbitration clauses are to be decided by the court[,]" even when the parties' agreement states that "'any dispute relating to this arbitration clause shall be settled by arbitration'"). This Court should issue the writ because the court below erroneously decided an important question of federal law under the FAA that is completely at odds with this Court's decision in *First Options*, *supra*.

II. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With An Unbroken Line Of Decisions Of This Court.

The decision by the court below constitutes a sharp break from the ranks of this Court's previous decisions under the FAA. Section 2 of the FAA commands, as a matter of federal

law, that an arbitration agreement involving interstate commerce shall be enforced, subject to only one restriction: a "ground [which] exist[s] at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This broad principle of enforceability embodied in § 2 is not "subject to any additional limitations under state law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). Moreover, this Court has repeatedly construed the "savings" language of § 2 to prohibit a state from singling out arbitration agreements for disfavored treatment. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

What this means, for example, is that a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987). As this Court in *Perry* further explained:

> A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id. Accord Doctor's Assocs., Inc. v. Casarotto, 517 U.S. at 687 ("Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions") (emphasis in original); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 281 ("[s]tates may not . . . decide that a contract

is fair enough to enforce its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause").

Yet, the court below has done precisely what federal law says it may not do — impose upon an arbitration agreement principles of unconscionability that it has not applied to other contractual provisions. First, it completely ignored the first two factors it ordinarily considers in assessing whether a contractual provision is unconscionable — (1) whether a party to the contract is "uneducated," and (2) whether the party is "unsophisticated." *See Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992) (articulating six factors for determining whether a contract is unconscionable). Thus, the court below completely relieved the plaintiff, a person who attended college, from the burden of establishing two key elements of unconscionability. It did this even though in another, non-arbitration context it had declared that invalidating a contract on grounds of unconscionability "is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated." *Layne v. Garner*, 612 So. 2d at 408. The court's failure to follow its own precedent signals loud and clear the judicial antipathy toward arbitration agreements which underscores its decision and which accurately describes its historical views. *See Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983), *vacated*, *York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984); *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993), *rev'd*, 513 U.S. 265 (1995).

The court below next impermissibly strayed from this Court's teachings when it considered two factors in the unconscionability calculus — the breadth of the arbitration clause and the presence of *First Options* language assigning arbitrability issues to the arbitrator — that could only apply in the arbitration context. (App. 22a). It simply cannot be disputed that those alleged "indicia" of unconscionability take their "meaning precisely from the fact that a contract to

arbitrate is at issue." *Perry v. Thomas*, 482 U.S. at 493 n.9. Indeed, they have no meaning outside the arbitration context. They certainly were not designed "to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* Their use, therefore, is forbidden by the FAA.

Not only are these two factors expressly applicable only to arbitration agreements and therefore in violation of this Court's holdings in *Keating*, *Perry*, *Allied-Bruce*, and *Casarotto*, their use is particularly troublesome due to their incongruity with the policies undergirding the FAA. After all, in enacting the FAA, Congress adopted "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). To abide by this congressional mandate, all courts must "rigorously enforce agreements to arbitrate," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), with "all doubts" construed in favor of their enforceability. *Moses H. Cone*, 460 U.S. at 24-25.

Adoption of these new factors as indicia of unconscionability would, in essence, penalize a party for drafting an arbitration agreement that conforms fully to federal law. A broad clause that seeks arbitral resolution of *all* of the parties' disputes is completely consistent with Congress' goal of favoring arbitration as a dispute-resolution process; a state-law standard which deems such a broad arbitration clause unconscionable most assuredly is not.[5]

---

5. Under the FAA, the "scope" or "breadth" of an arbitration clause must be construed in the broadest manner possible. *Moses H. Cone*, 460 U.S. at 24-25. It is difficult to conceive, then, that such a pro-arbitration rule can be reconciled with a rule of state law which declares that the breadth of an arbitration clause may determine its unconscionability. These two principles cannot co-exist, which means that the state law principle must yield ground to the FAA. *Casarotto*, 517 U.S. at 687-88.

A clause which tracks the directives of *First Options* and clearly states who decides arbitrability questions surely conforms with federal law; a state-law standard denouncing such a written description of the arbitrator's role certainly does not.[6] The law is clear that parties are generally free under federal law "to structure their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). The court below ignored this Court's decisions articulating these principles of federal law. The "longstanding judicial hostility to arbitration agreements" demonstrated by the court below must give way to "the 'liberal federal policy favoring arbitration agreements.' " *Green Tree Financial Corp. – Alabama v. Randolph*, 121 S. Ct. 513, 522 (2000), *quoting Moses H. Cone*, 460 U.S. at 24.

All of which brings us to the central issue on which the opinion below turned — whether the plaintiff demonstrated that she lacked any "meaningful choice." (App. 27a).[7] In articulating its new test for unconscionability, the Alabama Supreme Court elevated to center stage the question of whether arbitration clauses in general have garnered such

---

6. The ultimate irony in the lower court's determination that the presence of *First Options* language could be an "indicia" of unconscionability is that the court did not even recognize that provision of the parties' arbitration agreement in this case. The court held that the trial court, not the arbitrator, should decide the arbitrability issues. (App. 21a). A contractual term that is completely ignored and not enforced should not then receive recognition as support for an unconscionability finding.

7. Whether respondent had any meaningful choice was, in the lower court's view, outcome determinative. We know this is true because the other indicia of unconscionability discussed by the court applied equally to the *April Reaves* case decided on the same day as *Branch*. But eight (8) of the nine (9) members of the court rejected the defense of unconscionability in that case. (App. 28a-29a).

popularity in the marketplace, such common usage, that a consumer cannot obtain a good or service without having to sign such an agreement. (App. 25a) (this is the "primary indicium" of unconscionability). But this approach runs afoul of this Court's prior decisions and the FAA in at least two respects.

1. The court below has never ruled, outside the arbitration context, that the mere "prevalence" of a contractual term in the marketplace points toward its unconscionability. Indeed, the contrary is true. Prior to its decision in this case, the Alabama Supreme Court had held that when a provision in a contract had become so "widely used and accepted in a particular trade," there is "a prima facie case that the usage is reasonable." *Fleming Farms v. Dixie Ag Supply, Inc.*, 631 So. 2d 922, 926 (Ala. 1994) (disclaimer of consequential damages provision); *Southland Farms, Inc. v. Ciba-Geigy Corp.*, 575 So. 2d 1077, 1080 (Ala. 1991) (same). In this case, the court applied the opposite presumption, declaring that the arbitration agreement is unconscionable precisely because it was "widely used and accepted in a particular trade." (App. 26a-27a). It is clear, therefore, that the lower court's new test did not "ar[i]se to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. at 492 n.9. Instead, it was designed to "singl[e] out arbitration provisions for suspect status," in violation of Congress' mandate that arbitration agreements be placed " 'upon the same footing as other contracts.' " *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, *quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

The radical nature of the court's ruling can only be fully appreciated by the realization that this "primary indicia" of unconscionability would be satisfied in hundreds of standard contract clauses in use today, clauses which heretofore no one (presumably) would contend were unenforceable. In the

lending field alone, for example, this new test would apply to a number of perfectly legal contractual terms, including: (1) the creation of security interests in favor of the lender for collateral pledged to secure the loan; (2) late fee charges for delinquent payments; (3) acceleration clauses upon default; (4) requirements to maintain insurance on the collateral; and (5) payment of the lender's attorneys' fees incurred with any attempts at debt collection. All of these are routine contractual terms found in all modern-day loan contracts, and all are terms which many (if not all) borrowers would prefer to avoid because they favor the lenders.[8]

All of these standardized terms were present in the parties' contract. Only the arbitration agreement was invalidated; these other contractual terms survived. All of these terms are also routinely present in modern-day loan

---

8. The reality is that the vast majority of consumer contracts are carried out using preprinted forms, and that most of the clauses in these forms are standard in the industry. There are very good reasons for this commercial practice, and nothing is inherently wrong with it. Standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, allowing the drafter to rationally calculate the costs and risks of performance, which contributes to rational pricing. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991). Indeed, given the volume and speed of consumer transactions in modern society, standard form contracts appear to be inevitable. It is hard to imagine how the millions of consumer transactions each year in *Alabama alone* could be conducted without this device. *See* 1 *Corbin on Contracts* § 1.4 (rev. ed. 1993) ("The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced."). This Court has routinely enforced such so-called adhesion contracts according to their terms under the FAA. *See, e.g., Green Tree Financial Corp. – Alabama v. Randolph*, 121 S. Ct. 513 (2000); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991); *Perry v. Thomas* 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

contracts. But only the arbitration clause has been invalidated by the court below due to its prevalence in the market. The Alabama Supreme Court's decision to ignore the prevalence of these other routine contractual terms, while applying its new "prevalence" test solely to the parties' arbitration clause, shows the ruling for what it truly is — one that singles out arbitration clauses for disfavored treatment, in violation of Congress' contrary commands and this Court's consistent instructions. That ruling embodies precisely the focused hostility toward arbitration which must give way to the FAA.

2. The Alabama Supreme Court's views on "prevalence" are erroneous on an even more fundamental level — they run headlong into Congress' objectives in enacting the FAA in the first place. As this Court has often recognized, the FAA was enacted to foster a "federal policy favoring arbitration" in a variety of business and consumer settings. *Moses H. Cone*, 460 U.S. at 24. Congress sought to effectuate this pro-arbitration policy when it chose to place arbitration agreements on the same and equal footing as other contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 281. Arbitration agreements have since flourished nationwide as a preferred method of resolving disputes, with financial institutions, franchisors, retailers, and other companies now regularly including standard arbitration provisions in their contracts. *See generally* Henry C. Strickland, "The Federal Arbitration Act's Interstate Commerce Requirement: What's Left For State Arbitration Law?" 21 *Hofstra L. Rev.* 385, 429-54 (1992).

But the court below invalidated the parties' arbitration agreement precisely because other companies in the marketplace had accepted Congress' open invitation to use them. The FAA, it would seem, has become a victim of its own success. But the federal policies and objectives which the FAA embodies cannot be shrugged off so easily. A state-law policy which counts the number of companies that use

arbitration agreements, and then invalidates an arbitration agreement if that count yields a number too high, cannot co-exist side by side with a federal policy which encourages *all* companies to employ arbitration agreements. Widespread use of arbitration agreements, in the view of the court below, proved that the arbitration agreement under review should not stand. But it is "widespread use" of arbitration agreements which Congress actually sought when it enacted the FAA in the first place. *See Moses H. Cone*, 460 U.S. at 24.

Therefore, even assuming that the lower court's "prevalence" argument has found acceptance in other areas of Alabama law (which it has not), it cannot keep close company with the FAA's pro-arbitration policies. Because of the inherent conflict in these two policies, the state law must yield ground to the preemptive power of the FAA. *See Perry v. Thomas*, 481 U.S. at 493; *Southland Corp. v. Keating*, 465 U.S. at 16-17. The judgment of the court below cannot stand.

III. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With Decisions Of The Second And Seventh Circuit Courts Of Appeals On The Same Issue.

In *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999), the party opposing arbitration argued that a particular clause contained in an arbitration agreement governed by the FAA was unconscionable, relying on a decision from the New Jersey Supreme Court which did not apply to contracts generally. 150 F.3d at 161-62. The Second Circuit rejected this unconscionability argument because the state court decision "did not establish a 'generally applicable' contract defense that applies to 'any' contract." 150 F.3d at 163. The Second Circuit explained that a " 'state law, whether of legislative

or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " *Id.* at 162-63, *quoting Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis in original). The court held that the state court's decision was "preempted by the FAA" because it "impermissibly burden[ed] arbitration agreements." *Id.* at 162-63.

The decision by the court below in this case is in direct conflict with the Second Circuit's decision in *Hamilton*, *supra*. The court below used two indicia of unconscionability that apply solely to arbitration agreements but that did not and do not " 'exist at law or in equity for the revocation of *any* contract.' " *Hamilton*, 150 F.3d at 162, *quoting* 9 U.S.C. § 2 (emphasis added). In fact, the court below based its decision of unconscionability on arbitration provisions and policies approved by this Court and never before used by the court to strike down a contractual provision as unconscionable. The rationale and conclusion adopted by the court below simply cannot be reconciled with the Second Circuit's rationale and conclusion in *Hamilton*.

Also in direct conflict with the decision below is the Seventh Circuit's decision in *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999). The party opposing arbitration in *Engen* argued that the arbitration provision was unconscionable on the ground that it lacked mutuality of remedy — the arbitration agreement "require[d] the franchisees to arbitrate their claims while permitting the franchisor to litigate its claims through eviction actions." 180 F.3d at 843. The Seventh Circuit held that the parties' arbitration agreement was not unconscionable based on this state-law defense of lack of mutuality of remedy. *Id.* The court below, on the other hand, held the opposite. (App. 24a).

In addition to being in direct conflict with the Seventh Circuit's decision in *Engen*, *supra*, the decision below is in

direct conflict with the Seventh Circuit's decision in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999). In *Koveleskie*, the plaintiff argued that the arbitration agreement she signed, the securities industry's "Form U-4," was unconscionable because it was a "contract of adhesion," offered on a "take-it-or-leave-it" basis, thereby "plac[ing] her in a position of reduced bargaining power vis-a-vis her employer." 167 F.3d at 366. The Seventh Circuit refused to "invalidate this contract for unconscionability" because

> Illinois law does not void contracts where parties have unequal bargaining power, even if a contract is a so-called "take-it-or-leave it" deal and consent to the agreement is secured because of hard bargaining positions or the pressure of financial circumstances. . . . The mere fact that a person enters into a contract as a result of the pressure of business circumstances is not sufficient.

Id. at 367.

Unlike the Seventh Circuit in *Koveleskie*, *supra*, the court below held that petitioners' superior "bargaining power" rendered the parties' agreement to arbitrate unconscionable. (App. 25a). Under *general* principles of contract law in Alabama, however, the doctrine of unconscionability "is one of the prevention of oppression and surprise and *not* of disturbance of allocation of risks because of superior bargaining power." *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 716 (Ala. 1989) (emphasis added). The majority acknowledged this basic principle in its opinion in this case (App. 9a), but nevertheless held that the parties' agreement to arbitrate is unconscionable based in part on petitioners' superior "bargaining power." (App. 25a). *But see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)

("[m]ere inequality of bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable").

This new "state law is preempted by the FAA," for it "singles out arbitration agreements . . . by imposing restrictions separate from its general contract law." *Koveleskie*, 167 F.3d at 367, *citing Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-88 (1996). In no event can the decision by the court below be squared with the Seventh Circuit's decision in *Koveleskie*, *supra*. The preemption issue presented by this case is obviously important to others beyond the immediate parties because it penalizes everyone who drafts and relies on an arbitration agreement that conforms fully to federal law. (*See* pages 17-18, *supra*). The issue of unconscionability under the FAA is also a recurring one on which, as we have shown, the courts are in conflict. The Court should issue the writ because the decision below is legally incorrect and in direct conflict with applicable decisions from at least two federal courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. RUTHERFORD
F. A. FLOWERS, III*
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*

APPENDIX

OPINIONS OF THE SUPREME COURT OF ALABAMA
DATED AND FILED DECEMBER 22, 2000

RELEASED
DEC 22 2000
CLERK
SUPREME COURT OF ALABAMA

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1990887

American General Finance, Inc., et al.

v.

Mable Branch

1990888

American General Finance, Inc.

v.

April Reaves

Appeals from Hale Circuit Court
(CV-98-065 and CV-98-120)

COOK, Justice.

American General Finance, Inc. ("American General"); Merit Life Insurance Co. ("Merit"); and Yosemite Insurance Company ("Yosemite") (collectively "the Lenders") appeal from an order denying their motions to compel the arbitration of claims presented in an action commenced by Mable Branch (appeal no. 1990887) and an order denying their motions to compel the arbitration of claims presented in an action commenced by April Reaves (appeal no. 1990888). We affirm as to case 1990887, but as to case 1990888 we reverse and remand.

The claims of Branch and Reaves arose out of a series of loan transactions in which they separately borrowed money from American General. In Reaves's case, the first transaction occurred in December 1994, and the second on November 2, 1995. In Branch's case, the first transaction occurred on July 3, 1996; a second on October 18, 1996; and a third on November 21, 1997.

The "Note and Security Agreement" signed by Branch on November 21, 1997, contained the following pertinent provisions:

> "Borrower(s) hereby acknowledge that the transactions evidenced by this agreement involve interstate commerce. Borrower and Lender agree that, except as otherwise set forth in this provision, all claims, disputes, or controversies of every kind and nature between Borrower(s) and Lender shall be resolved by arbitration, including (i) those based on contract, tort or statute, (ii) those arising out of or relating to the transaction(s) evidenced by this agreement, the disclosures relating to this agreement, the Federal Disclosure Statement, any

insurance certificates or policies, any documents executed at or about the same time this agreement was executed or (iii) those arising out of, relating to any other prior, proposed or actual loan or extension of credit, (and the relationships which result from these transactions or any other previous transactions between Borrower(s) and Lender). **Borrower(s) and Lender further agree that all issues and disputes as to the arbitrability of claims must also be resolved by the arbitrator.**

". . . .

"Arbitration of such claims will be conducted by a single arbitrator selected by the Borrower(s) and Lender, pursuant to the Federal Arbitration Act, [9 U.S.C. § 1 *et seq.* (the "FAA"),] and according to the commercial rules of the American Arbitration Association, at a reasonable and convenient location to be selected by the Borrower(s). Each party shall pay one-half of the arbitration costs and expenses.

". . . .

"BORROWER(S) AND LENDER AGREE THAT THE ARBITRATOR MAY AWARD PUNITIVE DAMAGES ONLY UNDER CIRCUMSTANCES WHERE A COURT OF COMPETENT JURISDICTION COULD AWARD SUCH DAMAGES. HOWEVER, IN NO EVENT SHALL AN AWARD OF DAMAGES EXCEED FIVE (5) TIMES THE ECONOMIC LOSS SUFFERED

BY THE PARTY. BORROWER(S) AND LENDER FURTHER AGREE THAT THE ARBITRATOR SHALL NOT CONDUCT ANY CLASS-WIDE PROCEEDINGS AND WILL BE RESTRICTED TO RESOLVING THE INDIVIDUAL DISPUTES BETWEEN THE PARTIES."

"Borrower(s) and Lender agree that, notwithstanding the foregoing, Lender retains the right to use judicial or self-help remedies (i) to repossess or foreclose on collateral or to enforce the security interests relating to this transaction, and (ii) to pursue collection actions against the Borrower(s) where the amount of the debt is $10,000 or less. The exercise of this right by Lender to pursue judicial or self-help remedies shall not constitute a waiver of Lender's right to compel the arbitration of any claim or dispute subject to this arbitration clause — including the filing of a counterclaim by Borrower(s) in a lawsuit filed by Lender.

"The arbitration clause shall be binding upon the assigns, directors, officers, representatives, employees, parent companies, affiliated companies, subsidiaries and successors of Lender, and the administrators, assigns, executors, heirs and representatives of Borrower(s). In addition, the parties agree to submit to arbitration not only the foregoing claims or disputes against each other, but also all claims or disputes they have against (i) all other persons or entities involved with the transactions subject to this clause, (ii) all persons or entities who signed or executed

> any of the documentation subject to this clause, and (iii) all persons or entities who may be jointly or severally liable to any of the parties to this agreement regarding matters or events relating to the transactions and documentation subject to this clause."

(Boldface type and capitalization in original.)

The "Note and Security Agreement" executed by Reaves on November 2, 1995, contained arbitration provisions that differed from the ones in Branch's contract in only one material respect. That agreement did not contain the provision purporting to make arbitrable "all issues and disputes as to the arbitrability of claims." (Boldface type omitted.)

Branch and Reaves commenced their actions on June 15, 1998, and September 11, 1998, respectively. Branch sued Merit and Yosemite, as well as American General, while Reaves sued only American General. Broadly stated, the substantive allegations common to both complaints were that the plaintiffs were enticed, pursuant to a scheme or plan, to borrow money under circumstances that enabled the defendants (1) to collect excessive finance charges; (2) to sell customers "duplicative services" through "flipping"[1]; and (3) to collect unnecessary or excessive premiums for credit-disability insurance and life insurance.

All defendants moved to compel arbitration of the actions, based on the arbitration provisions in the "Note and Security Agreement" documents. In a written order, the trial

---

1. "Flipping" has been described as "a practice whereby customers are encouraged to refinance existing loans rather than make new and separate loans." *Williams v. Norwest Fin. Alabama, Inc.*, 723 So. 2d 97, 104 (Ala. Civ. App. 1998).

court denied the motions on the ground that the arbitration provisions were unconscionable. The order stated in pertinent part:

> "This matter comes before the court on the motions of the defendants [American General, Merit, and Yosemite], to compel the disputes of the plaintiffs to arbitration in *Branch* and the same motion on behalf of [American General] in *Reaves*.
>
> "The parties have, pursuant to this court's order conducted extensive discovery on the issues, and have submitted voluminous filings to support the record on their respective positions. Along with the *Branch* case, they have simultaneously done discovery in the [*Reaves* case].
>
> "Because the issues in *Branch* and *Reaves* are the same as to [American General], they will be addressed together. The issues in *Branch* as to [Merit and Yosemite] are much less complex and can be disposed of summarily, and they will, therefore, be addressed first.
>
> "It is indisputable that both Merit and Yosemite rely upon the provisions of the retail installment contract in the American General document. The *broad arbitration provision in this case* clearly may be read to encompass the subsidiaries of American General, in this case, Merit and Yosemite. Therefore, to the extent that Merit and Yosemite move to compel arbitration, the findings of this court as to American General appl[y] equally to them, and they will be bound to these findings.

"The court's first duty in considering whether to grant the motion of the defendants is to determine whether or not the parties agreed to arbitrate. The *breadth of the clause* is not at issue until that determination is made.

"Facially, the parties have signed the contracts in question. That fact, in and of itself, is not dispositive, however, for as our Supreme Court, the Supreme Court of the United States, and the Federal Arbitration Act itself[ ] all say[,] [written] contracts requiring arbitration are subject to the defenses available under state law that would be available to resist any contract.

"Many of the defenses that are implicit in the evidence before the court would require this court, applying the summary judgment standard enunciated by our Supreme Court, to submit these issues for trial to a jury, as there are many questions of fact that could invalidate this provision if a jury believed the evidence and position argued by the plaintiffs.

"There are, however, contract defenses that are to be considered by the court. The Supreme Court of Alabama, in *Green Tree Financial Corp. of Alabama v. Vintson*, [753 So. 2d 497 (Ala. 1999)], noted that the defense of unconscionability is for the trial court . . . .

"The doctrine of unconscionability is codified in [Ala. Code 1975, § 5-19-16, which provides:

> " 'With respect to a consumer credit transaction, if the court as a matter of

> law finds the contract or any provision of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable provision, or it may so limit the application of any unconscionable provision as to avoid any unconscionable result.]'
>
> ". . . .

"Our [Supreme Court] has enumerated a series of factors appropriate for consideration of a clause purporting to require arbitration when evaluating it for unconscionability.

"The Alabama Supreme Court has noted:

> " 'Although Alabama law lacks an explicit standard for determining whether a contract or contractual provision is unconscionable, case law reveals that four factors are important in making this determination.
>
> " 'In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties,

> and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract.'

"*Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992).

"Further, in *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713 (Ala. 1989), the Supreme Court observed:

> " 'Comment (1) of the official comments to § 7-2-302 sets out the basic test to determine unconscionability:
>
> > " ' "[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."
>
> The intention of this section is to allow the courts to pass directly on the unconscionability of the contract or the particular clause therein and to make a

> determination as to its unconscionability. *Id.* It is within the court's discretion to refuse to enforce the contract as a whole if it is permeated by unconscionability, or to strike any single clause or group of clauses that are so tainted or that are contrary to the essential purpose of the agreement, or to simply limit the unconscionable clause so as to avoid unconscionable results.'

540 So. 2d at 716. *See also Williams v. E.F. Hutton Mortgage Corp.*, 555 So. 2d 158 (Ala. 1989); *Crestline Ctr. v. Hinton*, 567 So. 2d 393 (Ala. Civ. App. 1990); *Marshall v. Mercury Fin. Co.*, 550 So. 2d 1026 (Ala. Civ. App. 1989); *Advertiser Co. v. Electronic Eng'rs, Inc.*, 527 So. 2d 1317 (Ala. Civ. App. 1988).

"The issue of unconscionability is a question of law for the court and the party claiming unconscionability bears the burden of proof. *See, e.g., Green Tree Fin. Corp. of Alabama v. Vintson*, [753 So. 2d 497 (Ala. 1999)].

"As another example, in *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33 (Ala. 1998), Justice Lyons, in his concurring opinion, wrote:

> " 'Alabama has long recognized the doctrine of unconscionability as a defense to enforcement of a contract. While *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), relegates challenges to the validity of the contract as a whole to the arbitrator,

a challenge to the arbitration clause only is properly determined by the court.

" '. . . [U]nconscionability, under general principles of Alabama law, can be reduced to a four-part test: (1) whether there is an absence of meaningful choice on one party's part; (2) whether the contractual terms are unreasonably unfavorable to one party; (3) whether there was unequal bargaining power between the parties; and (4) whether the contract contained oppressive, one-sided, or patently unfair terms.

" 'I believe that a showing of financial hardship, lack of choice, and one-sidedness could, in a proper case, lead to a finding of unconscionability and a concomitant holding of unenforceability of an arbitration agreement that would not conflict with governing federal law.'

"718 So. 2d at 43. [(Citations omitted.)]

"Later, in *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998), the Court noted that:

" '[M]atters that could be germane to a determination of unconscionability, [include] a refusal of [the plaintiff's] request for assistance after she had notified someone that she was unable to see or to understand [the arbitration

> clause]; [the plaintiff's] inability to obtain the product made the basis of this action from this seller, or from another source, without having to sign an arbitration clause; the oppressiveness or unfairness of the mechanism of arbitration; or the [unfairness] of a discount or other quid pro quo in exchange for [the plaintiff's] accepting an arbitration agreement.'

"723 So. 2d at 52.

"Additional factors have been added in later cases. For example, in *Ex parte Parker*, 730 So. 2d 168 [,171] (Ala. 1999), the Court observed that 'lack of mutuality of remedy can be one factor, along with others, that a court may consider in determining whether an arbitration clause is unconscionable.' *See also Brilliant Homes, Ltd. v. Lind*, 722 So. 2d 753, [755] (Ala. 1998) (Lyons, J., concurring) (Arbitration clause that gives arbitrator power to determine its own authority 'may itself be an indicium of unconscionability.').

"Considering this guidance, the court has found this arbitration provision to be unconscionable as a matter of law.

". . . .

"Considering the factors discussed by Justice Lyons in *Dan Tucker*, the court finds the following:

"1. As to an absence of meaningful choice, this case presents a complete record wherein it is

indisputable that there was no *meaningful* [emphasis in original] choice in the matter. American General has answered written discovery, including requests for admissions wherein they admit that (admittedly, reluctantly). There are stipulations from the other finance companies who are available in this market to administer these sorts of loans, and it is clear that Norwest [Financial Alabama, Inc.], TranSouth [Financial Corporation], [and] AVCO [Financial Services of Alabama, Inc.], all require a consumer, knowingly or unknowingly, to execute an arbitration provision as a prerequisite to loaning the consumer the money.

"As *supported by the testimony, these finance companies compete for the same market, and Branch and Reaves, typical customers, are not customers who would go to a bank for loans of this sort.*

"2. It is abundantly clear that the contractual terms are unreasonably favorable to the defendants. The defendant makes a tacit admission of this by purporting to abdicate some of the most offensive terms.

"For example, the defendants stipulated to give the arbitrator the power to award costs and attorney fees to the prevailing party; they stipulated to allow the arbitrator to impose injunctive relief; they stipulated that they, the defendants, *would pay the filing fees*; they stipulated that the arbitrator could award an unlimited amount of compensatory damages.

"The court finds this series of stipulations to be very curious. Surely, the defendants do not purport to now unilaterally modify the written contract upon which they rely. For the defendants to even suggest this supports the very proposition that they, the defendants, are in a superior position, and that the relative positions of the parties are unequal.

"In point of fact, this is an adhesion contract, designed and drafted by the defendants, and as bad as that may be, it is worse that they purport to unilaterally fix what is clearly wrong with it.

". . . .

"The punitive damages available to the plaintiff are limited to five times the economic damages. The Supreme Court of the United States has declined to adopt an arithmetic formula; the Supreme Court of Alabama has declined to adopt an arithmetic formula; our legislature has adopted a tort reform package which rejected this approach. *Surely, a large corporate defendant cannot impose these terms.*

"Additionally, the contract purports to allow the defendant to use the court system to collect amounts up to $10,000.00, which, according to the testimony in this case, would include most of their loans. The court is aware that our Supreme Court has rejected lack of mutuality as a basis for denying arbitration. However, the lack of mutuality is appropriate for this court to consider in evaluating the basic fairness of this agreement.

> "Alabama statutory and common law [in]vest this court with the power to '. . . refuse to enforce the contract, or [to] enforce the remainder of the contract without the unconscionable clause, or [to] so limit the application of any unconscionable clause so as to avoid any unconscionable result.'
>
> "Accordingly, the court finds that the provisions of the subject contracts which purport to require arbitration of the disputes arising out of these contracts are unconscionable as a matter of law."

(Emphasis added except where noted.)

From this order, the defendants appeal. The appeals present these issues: (1) whether the FAA applies to the contracts; (2) whether a contract may remove from the judiciary the right to decide the threshold issue of unconscionability; and (3) whether, under these facts, the arbitration provision in either contract, or both contracts, is unconscionable.

I. Applicability of the FAA — Interstate Commerce

The FAA applies only (1) if there is a "written agreement calling for arbitration," *Prudential Sec., Inc. v. Micro-Fab, Inc.*, 689 So. 2d 829, 832 (Ala. 1997); and (2) if the contract containing the arbitration provision "substantially affects interstate commerce." *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] __ So. 2d __, __ (Ala. 2000). Relying on *Sisters*, Branch and Reaves contend that their contracts do not affect interstate commerce sufficiently to invoke the applicability of the FAA. We disagree.

Sisters involved a contract between the Sisters of the Visitation, operators of a "monastery and spiritual retreat in Mobile," and Cochran Plastering Company, Inc. ("Cochran"), an Alabama corporation. *Id.* at __. The contract required Cochran to "repair cracks in the plaster in the ceilings and wall of the chapel, to cast and install plaster moldings, and to pin up all loose moldings with screws and washers." *Id.* at __.

The Sisters commenced arbitration proceedings on the basis of an arbitration clause in the contract. Cochran sought to enjoin the arbitration proceedings, arguing, among other things, that the transaction did not have a nexus with interstate commerce sufficient to invoke the FAA. This Court agreed with Cochran, holding that the contract did not "substantially affect[ ] interstate commerce." *Id.* at __.

In so holding, we explained:

> "The Sisters of the Visitation and Cochran are both Alabama residents, and the contract was to be performed in Alabama. The only affiliation of any of the parties with out-of-state entities is found in the relationship between the Sisters and the Roman Catholic Church. We are simply not prepared to recognize that relationship as commercial activity in interstate commerce, analogous to the network of Terminix franchises across the country. See [*Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 282 (1995)]."

Id. at __.

Regarding Cochran's use of "tools and equipment," we said:

> "One must assume that Cochran brought tools and equipment to the project site, but the record is silent as to whether they were leased or purchased specially for the project and, if so, whether they had moved in interstate commerce. . . . No substantial effect on interstate commerce can be developed based on Cochran's acquiring in interstate commerce any tool and equipment to be used in the performance of this contract."

Id. at __.

Discussing the "services and materials" required by the contract, we said:

> "We have no indication that Cochran employed out-of-state workers, so we assume that its workers were local. The contract apparently specified the use of plaster and washers that were required to be obtained from outside the State, and it called for insurance, which was obtained from an insurance company from outside the State. However, the record provides no information from which we can determine what portion of the amount the Sisters paid Cochran is allocable to the cost of local labor and overhead and what portion is allocable to materials or services specially purchased for use or consumption in performance of the contract."

Id. at __. Also, we noted that "the object of the services provided by Cochran," that is, the chapel and its repairs, was

"incapable of subsequent movement across state lines or of otherwise having a subsequent substantial effect on interstate commerce." *Id.* at __.

Finally, we considered the extent to which the contract was connected with, or implicated, other contractual relationships. In that connection, we said:

> "Cochran's contract is related to several other contracts, apparently also made *directly with the Sisters*, including a contract with the architect for the chapel project; contracts with workers in the various trades whose work was called for in the foregoing description of the scope of the work; and a contract with the Texas resident who prepared the specifications for the plaster work. The fact that several of the related contracts have a substantial effect on interstate commerce cannot be seriously disputed."

Id. at __ (emphasis added). We focused on the effect the subject contract would "*in fact* have on those other contracts." *Id.* at __ (emphasis added). There was no evidence — or contention — that the related contracts would be "disrupt[ed]," by "delays or distraction" associated with litigation. *Id.* at __. We concluded that the FAA was inapplicable.

In this case, however, Branch and Reaves concede that American General was incorporated in Alabama by American General, Inc., "a large, multi-national corporation," for the purpose of doing business in Alabama. *Brief of Appellee Branch*, at 9 n.1; *Brief of Appellee Reaves*, at 8 n.1. The headquarters of American General, Inc., are in Indiana. Affidavit testimony in the record indicates that "the money which [American General] provides as loans to its customers is made available to [American General] through an affiliated

corporation, American General Finance Corporation ("AGFC"), an Indiana corporation also headquartered in Indiana." (Clerk's Record in Case 1990888, at 76.) "The money is sent to [American General] . . . from AGFC's bank account located outside Alabama, and when payments are made by customers to [American General], those funds are ultimately sent out of state to AGFC's bank accounts as repayment of the funds previously furnished to [American General]." *Id.*

Merit, through which American General allegedly sold credit-life insurance to Branch, is an Indiana corporation headquartered in Indiana. *Id.* at 74. Yosemite, through which American General sold credit-disability and credit- property insurance to Branch, is incorporated in California and headquartered in Indiana. *Id.* at 75. "Some of the employees who work at the [American General] branch offices are also licensed agents of Merit and Yosemite." *Id.* When a customer purchases credit insurance in connection with a loan from American General, he or she "is issued a certificate of insurance from either Merit or Yosemite, which certificate had been previously sent to the American General offices in Alabama." *Id.* "Information about each customer is gathered in the Alabama branch offices and then transmitted to Merit's or Yosemite's headquarters in Indiana, where it is stored in a computer data base." *Id.* Indeed, the corporate relationships involved here generate precisely the complex interstate commercial activity that we expressly noted was absent in *Sisters.*

These cases are also diametrically opposed to *Sisters* in that there, "the object of the services" — the chapel and its repairs — was "incapable of subsequent movement across state lines or of otherwise having a subsequent substantial effect on interstate commerce." __ So. 2d at __. Here, the object of the transaction — the loan proceeds — was

intrinsically mobile. In other words, the proceeds enabled Branch and Reaves subsequently to purchase goods and services that traveled in interstate commerce.

We need not belabor the issue to conclude that these transactions substantially affected interstate commerce. See *Staples v. Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996) (loan transaction negotiated in Alabama involved interstate commerce where the lender was a Georgia corporation; loan proceeds were "wired from Georgia and then disbursed . . . in Alabama; all supplies for the Alabama Money Tree office were shipped from Georgia; and all loan documents were printed in Georgia"). Indeed, Branch and Reaves have cited *no case* holding that loan transactions resembling those involved here did not affect interstate commerce for purposes of the FAA. Consequently, we conclude that these contracts invoke the FAA.

II. Unconscionability

A threshold question in the discussion of whether these arbitration agreements were unconscionable is whether that determination is to be made by the court or by the arbitrator. The arbitration clause in Branch's contract purports to stipulate that the arbitrator is to decide the threshold issues of arbitrability, such as whether the arbitration clause itself is unconscionable. Of course, that is the defendants' position.

A. Who Decides?

Nevertheless, "a determination that, by the terms of the arbitration clause, the arbitrator is to decide issues of arbitrability does not end the inquiry." *Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 413 (Ala. 1999). "Where the attack is addressed to the arbitration clause itself, as opposed to the contract as a whole, the court, and not the arbitrator,

resolves the issue." *Id.* Thus, the threshold "issue of unconscionability of an *arbitration clause* is a question for the court and not the arbitrator." *Id.* at 415 (emphasis added). See also *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998); *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 41 (Ala. 1998) (Lyons, J., concurring specially).

Branch and Reaves contend that the *arbitration clauses* were, *themselves*, unconscionable. Indeed, that was the only question addressed by the trial court, and that is the only substantive issue before this Court. The trial court did not err, therefore, in holding that it would determine whether the arbitration clauses are unconscionable. Thus, we shall proceed to consider whether the trial court erred in concluding that the clauses were unconscionable as to *both* Branch and Reaves.

B. Branch's Contract

The trial court's order sets out in general terms the conditions under which a contract may be held to be unconscionable. More specifically, it discussed and applied the *Layne v. Garner* factors, namely: "(1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided or patently unfair terms in the contract." 612 So. 2d at 408. For ease of discussion, we can reduce the *Layne v. Garner* test further to one comprised of two essential elements: (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power. Where these elements are present, Alabama courts will intervene under the guidance of § 5-19-16. Applying these factors, we conclude that the arbitration clause in Branch's contract is unconscionable.

(1) Grossly Favorable Terms

The first indicium of unconscionability is the breadth of the clause. The arbitration provision in Branch's contract is unusually broad in scope and application. It applies to every "dispute[ ] or controversy[ ] . . . *relating to*" every actual or *potential* transaction — whether *past*, present, or future — and to every person, whether signatory or nonsignatory to any document, involved in such a transaction between the parties. (Emphasis added.) Thus, it applies to every cause of action that could conceivably arise in favor of Branch, and to every individual against whom a claim could conceivably be brought. This Court has often recognized that the phrase "relating to" is one of the *broadest* of the coverage provisions. *Beaver Constr. Co. v. Lakehouse, L.L.C.*, 742 So. 2d 159, 165 (Ala. 1999); *Green Tree Fin. Corp. of Alabama v. Vintson*, 753 So. 2d 497 (Ala. 1999); *Kenworth of Dothan, Inc. v. Bruner Wells Trucking, Inc.*, 745 So. 2d 271 (Ala. 1999); *Ex parte Conference America, Inc.*, 713 So. 2d 953 (Ala. 1998); *Reynolds & Reynolds Co. v. King Autos., Inc.*, 689 So. 2d 1 (Ala. 1996); *Ex parte Gates*, 675 So. 2d 371 (Ala. 1996); *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258 (Ala. 1994).

A second indicium of unconscionability is the provision purporting to invest the arbitrator with the threshold issues of arbitrability. "Such authority of the arbitrator to determine its own authority may itself be an indicium of unconscionability." *Brilliant Homes, Ltd. v. Lind*, 722 So. 2d 753, 755 (Ala. 1998) (Lyons, J., concurring in the result).

A third indicium is the provision *exempting* the *Lenders* from the duty to arbitrate and expressly reserving for *them* the right to try to a jury their claims against Branch up to $10,000. Practically speaking, this provision *benefits only the Lenders*. In other words, American General reserved for

itself the right to collect by *judicial action* the loan payments — the only species of claim it would ever realistically be expected to assert against Branch — while requiring Branch to settle by *arbitration* claims such as breach of contract and fraud — the species of claims she would most likely assert against the Lenders.

More than once, this Court has expressed concern about such provisions. In *Northcom, Ltd. v. James*, 694 So. 2d 1329 (Ala. 1997), two Justices stated in the main opinion:

> "[I]n a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to compel arbitration based on the doctrines of mutuality of remedy and unconscionability."

Id. at 1338. In *Ex parte McNaughton*, 728 So. 2d 592 (Ala. 1998), *cert. denied sub nom. McNaughton v. United Healthcare Servs., Inc.*, __ U.S. __, 120 S. Ct. 59 (1999), we disapproved that rationale; however, in *Ex parte Parker*, 730 So. 2d 168, 171 (Ala. 1999), we said: "The Parkers' argument has merit to the extent that the *lack of mutuality of remedy can be one factor,* along with others, that a court may consider in determining whether an arbitration clause is unconscionable." Thus, the absence of mutuality of remedy is still relevant in an unconscionability analysis. See *Green Tree Fin. Corp. v. Wampler,* 749 So. 2d 409, 416 (Ala. 1999) ("while the agreement restricts the Wamplers to arbitration while reserving to Green Tree the option to litigate, this fact, standing alone, is not sufficient to warrant a finding of unconscionability").

This provision is particularly significant in view of the companion provision purporting to limit the right of the arbitrator to award an amount "exceed[ing] five times the amount of *economic* loss." (Emphasis added.) This limitation includes not only punitive damages, but all species of noneconomic loss, such as mental anguish. It goes without saying that such damages may be recovered in litigation. Under these contracts, the arbitrator "cannot award the full panoply of relief available in state courts under Alabama law." *Roberson v. Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 (M.D. Ala. 1997).

Although the *Roberson* court held that the arbitration provision at issue was not unconscionable, it expressly noted that the contract did not limit the amount recoverable in arbitration. *Id.* Significantly, it further stated: "The court therefore does not have before it whether a contract that not only requires the borrower to arbitrate any claim, while reserving for the lender the right to seek judicial remedies in the eventuality of default, but *also restricts the borrower's range of relief in arbitration,* is unconscionable." *Id.* n.8 (emphasis added). See also *Wampler*, 749 So. 2d at 415 (one indicium of unconscionability is the "oppressiveness or unfairness of the mechanism of arbitration").

That, of course, is *this* case. It is one in which the Lenders have reserved for themselves the right to *full redress* for *their* claims, but denied that right to Branch. In other words, the contract limits not only the right to a specific *forum*, but the *right to a remedy itself.*

In that respect, this case differs fundamentally from others in which we have upheld clauses reserving for one party the right to litigate, but restricting the other party to arbitration. For example, in *Napier*, *supra*, the pertinent provision stated: "The parties agree and understand that the

arbitrator shall have *all powers provided by the law* and the Contract. These powers shall include *all legal and equitable remedies* including, but not limited to, money damages, declaratory relief and injunctive relief." 723 So. 2d at 51 (emphasis added). See also *Ex parte Parker*, 730 So. 2d at 170 (functionally identical provision); *Green Tree Fin. Corp. v. Vintson*, 753 So. 2d 497, 500 (same); *Ex parte Smith*, 736 So. 2d 604 (Ala. 1999) (same).

In short, the arbitration provisions in this contract are so grossly favorable to the Lenders as to pass the first prong of the simplified *Layne v. Garner* test.[2] Thus, it remains only to be determined whether Branch had any meaningful choice.

(2) Overwhelming Bargaining Power

A primary indicium of unconscionability in the modern consumer-transaction context is whether the consumer has the ability "to obtain the product made the basis of [the] action" without signing an arbitration clause. *Wampler*, 749 So. 2d at 415. In this connection, Branch testified by affidavit:

> "All of the documents and forms I signed which were used in borrowing the money in question were provided to me by American General Finance, Inc. I did not provide any of them, I did not have any input into them, and

2. As the trial court noted, American General has "stipulated" that, if "the Court compels the plaintiff to submit the claims to arbitration, the arbitrator shall be entitled to award compensatory damages in the same manner in which a judge or jury would award such damages under Alabama law if this case [had] proceeded to trial." However, the proposal raises a host of issues relating to the efficacy — if not the relevancy — of that stipulation, including accord and satisfaction, anticipatory breach, and novation, none of which has been briefed or discussed. We, therefore, do not consider it.

> I did not have any choice about what documents to sign if I wanted to borrow the money. I was told that in order to borrow the money I had to sign all the paperwork where they showed me."

Moreover, the record contains evidence indicating that when Branch acquired her loans from American General on July 3, 1996; October 18, 1996; and November 21, 1997, the market was virtually closed to consumers seeking comparable financing without agreeing to arbitration provisions.

The record contains stipulations and affidavit testimony of 8 of the 16 companies (the 8 including American General) that were listed in the advertising pages of the Southern Directory Company telephone directory for the City of Tuscaloosa under the heading "Financing."[3] The other seven companies are Associates Financial Services Company of Alabama, Inc.; TranSouth Financial Corporation; AVCO Financial Services of Alabama, Inc.; First Family Financial Services, Inc.; City Finance Company of Alabama, Inc.; Norwest Financial Alabama, Inc.; and Household Finance Corporation of Alabama. Of these companies, only Household Finance Corporation of Alabama "did not routinely enter into arbitration agreements in connection with its loans during the 1994-97 time frame." Norwest Financial Alabama, Inc., and AVCO Financial Services of Alabama, Inc., began requiring loan applicants to sign arbitration agreements in August 1995. Associates Financial Services Company of Alabama, Inc.; TranSouth Financial Corporation; and First Family Financial Services, Inc., began requiring loan applicants to sign arbitration agreements in

---

3. Branch is a resident of Gallion, Alabama. We take judicial notice of the fact that she lives nearer to the City of Tuscaloosa than to any other city of comparable size.

May 1996. City Finance Company of Alabama, Inc., began requiring loan applicants to sign arbitration agreements in October 1996.[4]

Thus, when Branch applied for her November 21, 1997, loan, only one of the entities, namely, Household Finance Corporation of Alabama, did not require loan applicants to agree to arbitrate. Indeed, when she applied to American General for her first loan on July 3, only two of the companies, namely, Household Finance Corporation of Alabama, and City Finance Company of Alabama, Inc., did not require arbitration agreements.

We note that "[e]ntire segments of the market for certain goods and services . . . are being closed to consumers who are unwilling to forfeit the rights guaranteed them by the federal and state constitutions." *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J., concurring specially), *rejected on other grounds, Ex parte Perry*, 744 So. 2d 859 (Ala. 1999). In order to meet her burden of proof on this issue, a consumer need not show that the market was *completely* closed, only that she was unable to acquire goods or services without *considerable* expenditure of time and resources. Branch has made such a showing in this case. From the sample responses of the companies providing the kind of financing for which Branch was shopping in her geographical area, it follows that only 1 or 2 companies out of 16 might have allowed her to borrow money in November 1997 without agreeing to arbitrate. Branch would have had to expend considerable time and effort even to *find* these companies. Because the evidence demonstrates that Branch had no meaningful choice, the second *Layne v. Garner* factor is satisfied.

---

4. Incidentally, many of these entities filed copies of their arbitration provisions. None of those samples limits, as American General's material purports to do, the amount of damages the arbitrator could award.

For these reasons, we conclude that the trial court did not err in holding the arbitration provisions in Branch's contract to be unconscionable and unenforceable. The order in case 1990887 is affirmed.

C. Reaves's Contract

The foregoing analysis as to Branch's case would seem to require a similar result in Reaves's case. Unlike Branch, however, Reaves cannot demonstrate that she was unable to acquire goods or services without considerable expenditure of time and resources. This is so because Reaves obtained her last loan from American General on November 2, 1995. At that time, finance companies in her geographical location requiring agreements to arbitrate were still a *distinct minority.*[5] Thus, for all that appears in the record, one must conclude that she could — with a minimum of effort — have acquired financing without agreeing to arbitrate her claims.

In fact, she testified that she had borrowed money from "Citizens Bank" in Greensboro on two occasions since 1995 and that neither transaction involved an arbitration agreement. Moreover, she testified that, in seeking the loan of November 2, 1995, she contacted no entity other than American General. In other words, she did not shop around for a loan that did not involve an agreement to arbitrate. She testified that she asked no questions about the arbitration provisions in the Note and Security Agreement. Indeed, she testified that she did not *read* the Note and Security Agreement. Consequently, she has not demonstrated that she had no meaningful choice; therefore, the second *Layne v. Garner* factor is not satisfied in her case.

---

5. Reaves lives in Greensboro. We take judicial notice of the fact that she lives nearer to the City of Tuscaloosa than to any other city of comparable size.

For these reasons, we conclude that the trial court erred in holding that Reaves's arbitration agreement was unconscionable. The order in case 1990888 is, therefore, reversed, and that case is remanded.

Conclusion

In summary, the order in the *Branch* case is affirmed. The order in the *Reaves* case is reversed and the case is remanded.

1990887 — AFFIRMED.

Houston, Lyons, Johnstone, and England, JJ., concur.

Hooper, C.J., and Maddox, See, and Brown, JJ., dissent.

1990888 — REVERSED AND REMANDED.

Houston, See, Lyons, and England, JJ., concur.

Hooper, C.J., and Maddox and Brown, JJ., concur in the result.

Johnstone, J., dissents.

HOOPER, Chief Justice (concurring in the result in case 1990888, but dissenting in case 1990887).

I concur in the result in Reaves's case — that she should be compelled to arbitrate her dispute with the defendants. However, I disagree with the holding that Branch need not arbitrate her dispute with those same defendants; therefore, in the *Branch* case I respectfully dissent.

The trial court and this Court have focused almost exclusively on the issue of unconscionability, something I must admit is often in the eye of the beholder. I would argue that there is a question as to whether such an argument can be maintained because one of the elements of unconscionability is that "there was an absence of meaningful choice on one party's part."[6] *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992). However, that is not my primary objection to the main opinion.

---

6. Branch was certain that she had negotiated a loan in the past with the First Bank of Linden. The documents supporting that lending agreement did not contain an arbitration clause. Yet, she went to American General to borrow money and did not go to the First Bank of Linden to obtain the loan that is the subject of this controversy. She also has no recollection as to whether documents for loans she has had with Robinson Bank and Commercial Bank contained arbitration agreements. American General employees also testified that American General has never refused to extend a loan to a customer who requested the deletion of the arbitration agreement from the loan contract. These facts alone indicate to me that Branch had meaningful choices with respect to obtaining a loan that did not contain an arbitration clause. *Green Tree Fin. Corp. v. Vintson*, 753 So. 2d 497 (Ala. 1999) (Lyons, J., concurring specially) (lack of "mutuality of remedy" alone is not enough to make arbitration agreement unconscionable); *Mitchell Nissan, Inc. v. Foster*, [Ms. 1982183, June 23, 2000] __ So. 2d __ (Ala. 2000) (plaintiff failed to show that he had no meaningful options).

As with any kind of contract provision, a person who agrees to arbitrate disputes may not get another bite at the apple if that person experiences a change of heart and decides that arbitration is not what she wants. An agreement solemnized by a written pledge to the other party is not so lightly disregarded in Alabama or in the law generally. See *Locklear Dodge City, Inc. v. Kimbrell*, 703 So. 2d 303, 306 (Ala. 1997) ("To hold otherwise would turn the concept of 'sanctity of contract' upside down.")

In passing the Federal Arbitration Act ("FAA"), Congress sought to set "arbitration agreements upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). The United States Supreme Court has interpreted the FAA as prohibiting states from declaring that "a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause," and that Court has stated, "The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

Beyond the issue whether this particular dispute is covered by the arbitration agreement entered into by Branch, we have the question as to what forum should determine whether the dispute is arbitrable. That question, known as the question of "arbitrability," is separate and distinct from the unconscionability issue. The agreements signed by Branch each contained the following clause: "**Borrower(s) and Lender further agree that all issues and disputes as to the arbitrability of claims must also be resolved by the arbitrator.**" (Bold print original.) While the presumption is in favor of arbitration of disputes in the uncertain case, the presumption is against arbitration of the question of

arbitrability unless the contract clearly sets out that the parties agreed to have the arbitrator decide the issue of arbitrability. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court stated: "This Court, however, has . . . added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944 (quoting *AT & T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649 (1986)); see also *Brilliant Homes, Ltd. v. Lind*, 722 So. 2d 753 (Ala. 1998), and *Ex parte Perry*, 744 So. 2d 859 (Ala. 1999) (providing a detailed discussion of "arbitrability" and *First Options*, supra).

Branch's agreement to submit the arbitrability question to the arbitrator could not be any clearer. The clause is in no way ambiguous, and it is highlighted in bold print. The most cursory glance at this contract would reveal something special about that clause even to the laziest consumer eye. The questionable determination of unconscionability should not trump the arbitrability clause. Therefore, in the *Branch* case I would grant the mandamus petition and direct the trial court to grant the motion to compel arbitration.

SEE, Justice (concurring in case 1990888, dissenting in case 1990887).

I concur in the main opinion as it relates to the *Reaves* case. Reaves did not demonstrate that to obtain financing she had to accept the arbitration agreement — that she had "no meaningful choice." The trial court erred in holding that her contract was unconscionable. I dissent, however, from the main opinion as it relates to the *Branch* case.

In *Green Tree Financial Corp. of Alabama v. Vintson*, 753 So. 2d 497, 504 (Ala. 1999), this Court rejected the plaintiffs' claims that they had "no meaningful choice" with respect to an arbitration provision in a mobile-home sales contract. The plaintiffs claimed that all of the lenders through which the mobile-home seller financed purchases had arbitration provisions in their financing agreements. *Id.* at 504. However, there was evidence that at least *one* of the lenders doing business with the mobile-home seller did not have an arbitration provision in its financing agreement at the time of the plaintiffs' purchase, and the plaintiffs failed to present any evidence "to suggest that any of the lenders through which [the seller] financed the purchases . . . would have refused to finance the purchase had the [plaintiffs] objected to the arbitration provision." *Id.*

The main opinion concludes that Branch had "no meaningful choice" in obtaining financing because "only 1 or 2 companies out of 16 might have allowed her to borrow money . . . without agreeing to arbitrate,"[7] __ So.2d at __,

---

7. In this case, unlike the situation in *Vintson*, there was evidence in the record indicating Branch knew of at least one other lending institution from which she could have obtained a loan that did not require an arbitration clause. Branch had previously negotiated a loan with the First Bank of Linden, and the documents supporting that transaction did not contain an arbitration provision.

but Branch presented no evidence indicating that she shopped around before borrowing from American General.

I see no meaningful difference between the evidence presented in *Vintson* and that presented here by Branch. Therefore, I would hold that, under the rule set out by this Court in *Vintson,* the trial court erred in holding that the arbitration provision in Branch's contract was unconscionable and therefore unenforceable.

PER CURIAM OPINION OF THE SUPREME COURT OF ALABAMA OVERRULING APPLICATION FOR REHEARING DATED AND FILED MARCH 30, 2001

RELEASED
MAR 30 2001
CLERK
SUPREME COURT OF ALABAMA

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1990887

American General Finance, Inc., et al.

v.

Mable Branch

Appeals from Hale Circuit Court
(CV-98-065 and CV-98-120)

On Application for Rehearing in Case No. 1990887

PER CURIAM.

APPLICATION OVERRULED.

Moore, C.J., and Johnstone, Harwood, and Woodall, JJ., concur.

Lyons, J., concurs specially.

Houston, See, Brown, and Stuart, JJ., dissent.

LYONS, Justice (concurring specially).

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), dealing only with the question whether an arbitration agreement was executed, held that a clear expression of intent to arbitrate the question of arbitrability would place that issue before the arbitrator and not the court. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), decided 28 years earlier, the United States Supreme Court had held that the issue of unconscionability was for the court and not the arbitrator. *First Options*, which does not involve claims of fraud in the inducement of the arbitration clause or claims that the clause was unconscionable, does not even mention *Prima Paint*.

Until the issue is squarely addressed, I am unwilling to extend *First Options* to a case involving the defense of unconscionability on a theory that *First Options* has, *sub silentio*, modified *Prima Paint*. The further erosion of the authority of the court, in deference to an hourly compensated arbitrator with a vested interest in retaining rather than relinquishing jurisdiction, raises troubling questions of due process, especially where, as here, the issue

of unconscionability goes to the fundamental fairness of the proceeding. We should not extend *First Options* beyond the context of the issues presented in that case, without some statement from the United States Supreme Court as to the continued precedential value of *Prima Paint.*

CERTIFICATE OF JUDGMENT OF AFFIRMANCE OF THE SUPREME COURT OF ALABAMA DATED DECEMBER 22, 2000

IN THE SUPREME COURT OF ALABAMA
December 22, 2000

1990887
American General Finance, Inc., et al. v. Mable Branch (Hale Cir.Ct.No.: CV-98-065)

CERTIFICATE OF JUDGMENT

of Affirmance

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the cost of appeals be taxed against the appellants as provided by Rule 35, Alabama Rules of Appellate Procedure.

OPINION BY COOK, J. (32 pp.)

Houston, Lyons, Johnstone, and England, JJ., concur. Hooper, C. J., and Maddox, See, and Brown, JJ., dissent.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 17th day of April, 2001

/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

ORDER OF THE CIRCUIT COURT FOR HALE COUNTY, ALABAMA ON MOTIONS TO COMPEL ARBITRATION DATED JANUARY 24, 2000 AND FILED JANUARY 31, 2000

IN THE CIRCUIT COURT FOR HALE COUNTY, ALABAMA

Civil Action No. CV 1998-065

MABLE BRANCH,

Plaintiff,

vs.

AMERICAN GENERAL FINANCE, INC.; MERIT LIFE INSURANCE CO.; and YOSEMITE INSURANCE COMPANY,

Defendants.

AND

Civil Action No. CV 1998-120

APRIL REAVES,

Plaintiff,

vs.

AMERICAN GENERAL FINANCE, INC.,

Defendant.

FILED
JAN 31, 2000

BETTY GAYLE PATE, CLERK
HALE COUNTY, ALABAMA

ORDER ON MOTIONS TO COMPEL ARBITRATION

This matter comes before the Court on the motions of the defendants American General Finance, Inc., Merit Life Insurance Co., and Yosemite Insurance Company, to compel the disputes of the plaintiffs to arbitration in *Branch* and the same motion on behalf of American General Finance, Inc. in *Reaves*.

The parties have, pursuant to this Court's Order conducted extensive discovery on the issues, and have submitted voluminous filings to support the record on their respective positions. Along with the *Branch* case, they have simultaneously done discovery in the case of *April Reaves v. American General Finance, Inc.*, CV 1998-120, Circuit Court of Hale County, Alabama.

Because the issues in *Branch* and *Reaves* are the same as to American General Finance, Inc., they will be addressed together. The issues in *Branch* as to Merit Life Insurance Company (Merit) and Yosemite Insurance Company (Yosemite) are much less complex, and can be disposed of summarily, and they will therefore be addressed first.

It is indisputable that both Merit and Yosemite rely upon the provisions of the retail installment contract in the American General document. The broad arbitration provision in this case clearly may be read to encompass the subsidiaries of American General, in this case Merit and Yosemite. Therefore, to the extent that Merit and Yosemite move to compel arbitration, the findings of this Court as to American General applies equally to them, and they will be bound to those findings.

The Court's first duty in considering whether to grant the motion of the defendants is to determine whether or not the parties agreed to arbitrate. The breadth of the clause is not at issue until that determination is made.

Facially, the parties have signed the contracts in question. That fact, in and of itself, is not dispositive, however, for as our Supreme Court, the Supreme Court of the United States, and the Federal Arbitration Act itself, all say, contracts requiring arbitration are subject to the defenses available under state law that would be available to resist any contract.

Many of the defenses that are implicit in the evidence before the Court would require this Court, applying the summary judgment standard enunciated by our Supreme Court, to submit these issues for trial to a jury, as there are many questions of fact that could invalidate this provision if a jury believed the evidence and position argued by the plaintiffs.

There are, however, contract defenses that are to be considered by the Court. The Supreme Court of Alabama, in *Green Tree Financial Corporation of Alabama v. Vintson*, 1972191 (October 1, 1999), noted that the defense of unconscionability is for the trial court, and not for a jury.

The doctrine of unconscionability is codified in the Uniform Commercial Code at § 2-302:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Alabama has adopted this provision, and it is codified at § 7-2-302, Code of Alabama, in this same form.

Our Court has enumerated a series of factors appropriate for consideration of a clause purporting to require arbitration when evaluating it for unconscionability.

The Alabama Supreme Court has noted:

> Although Alabama law lacks an explicit standard for determining whether a contract or contractual provision is unconscionable, case law reveals that four factors are important in making this determination.
>
> In addition to finding that one party was unsophisticated and/or uneducated, a court should ask: (1) whether there was an absence of meaningful choice on one party's part; (2) whether the contractual terms are unreasonably favorable to one party; (3) whether there was unequal bargaining power among the parties; and (4) whether there were oppressive, one-sided or patently unfair terms in the contract.

Lane v. Garner, 612 So.2d 404, 408 (Ala. 1992).

Further, in *Wilson v. World Omni Leasing, Inc.*, 540 So.2d 713 (Ala. 1989), the Supreme Court observed:

> Comment (1) of the official comments to § 7-2-302 sets out the basic test to determine unconscionability:
>
> > [W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.
>
> The intention of this section is to allow the courts to pass directly on the unconscionability of the contract or the particular clause therein and to make a determination as to its unconscionability. It is within the court's discretion to refuse to enforce the contract as a whole if it is permeated by unconscionability, or to strike any single clause or group of clauses that are so tainted or that are contrary to the essential purpose of the agreement, or to simply limit the unconscionable clause so as to avoid unconscionable results.

540 So.2d at 716. *See also Williams v. E.F. Hutton Mortgage Corp.*, 555 So.2d 158 (Ala. 1989); *Crestline Center v. Hinton*, 567 So.2d 393 (Ala. Civ. App. 1990); *Marshall v. Mercury Finance Co.*, 550 So.2d 1026 (Ala. Civ. App. 1989); *Advertiser Co. v. Electronic Engineers, Inc.*, 527 So.2d 1317 (Ala. Civ. App. 1988).

The issue of unconscionability is a question of law for the court and the party claiming unconscionability bears the burden of proof. *See, e.g., Green Tree Financial Corp. of Ala. v. Vintson*, No. 1972191, 1999 WL 778496 (Ala., Oct. 1, 1999).

As another example, in *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So.2d 33 (Ala. 1998), Justice Lyons, in his concurring opinion, wrote:

> Alabama has long recognized the doctrine of unconscionability as a defense to enforcement of a contract. While *Prima Paint* . . . relegates challenges to the validity of the contract as a whole to the arbitrator, a challenge to the arbitration clause only is properly determined by the court.
>
> . . .
>
> [U]nconscionability, under general principles of Alabama law, can be reduced to a four-part test: (1) whether there is an absence of meaningful choice on one party's part; (2) whether the contractual terms are unreasonably unfavorable to one party; (3) whether there was unequal bargaining power between the parties; and (4) whether the contract contained oppressive, one-sided, or patently unfair terms.
>
> I believe that a showing of financial hardship, lack of choice, and one-sidedness could, in a proper case, lead to a finding of unconscionability and a concomitant holding of unenforceability of an arbitration agreement that would not conflict with governing federal law.

718 So.2d at 43.

Later, in *Ex parte Napier*, 723 So.2d 49 (Ala. 1998), the court noted that:

> [M]atters that could be germane to a determination of unconscionability, [include] a refusal of [the plaintiff's] request for assistance after she notified someone that she was unable to see or to understand [the arbitration clause]; [the plaintiff's] inability to obtain the product made the basis of this action from this seller, or from another source, without having to sign an arbitration clause; the oppressiveness or unfairness of the mechanism of arbitration; or the fairness of a discount or other quid pro quo in exchange for [the plaintiff] accepting an arbitration agreement.

723 So.2d at 52.

Additional factors have been added in later cases. For example, in *Ex parte Parker*, 730 So.2d 168 (Ala. 1999), the court observed that "lack of mutuality of remedy can be one factor, along with others, that a court may consider in determining whether an arbitration clause is unconscionable." *See also Brilliant Homes, Ltd. v. Lind*, 722 So.2d 753, 754 (Ala. 1998) (Lyons, J., concurring) (Arbitration clause that gives arbitrator power to determine its own authority "may itself be an indicium of unconscionability.").

Considering this guidance, the Court has found this arbitration provision to be unconscionable as a matter of law.

It is first of interest to note that the rules purporting to govern arbitration in this case are the "Commercial Rules" of arbitration. This is a consumer transaction, and the Court finds that to purport to require a consumer to arbitrate under commercial rules with a very sophisticated commercial entity raises a serious question of basic fairness.

This is clearly something that is appropriate for consideration in considering this matter ". . . in the light of the general commercial background and the commercial needs of the case. . .".

Considering the factors discussed by Justice Lyons in *Dan Tucker*, the Court finds the following:

1. As to an absence of meaningful choice, this case presents a complete record wherein it is indisputable that there was no **meaningful** choice in the matter. American General has answered written discovery, including requests for admissions wherein they admit this (admittedly, reluctantly). There are stipulations from the other finance companies who are available in this market to administer these sorts of loans, and it is clear that Norwest, Transouth, Avco all require a consumer, knowingly or unknowingly, to execute an arbitration provision as a prerequisite to loaning the consumer the money.

As supported by the testimony, these finance companies compete for the same market, and Branch and Reaves, typical customers, are not customers who would go to a bank for loans of this sort.

2. It is abundantly clear that the contractual terms are unreasonably favorable to the defendants. The defendant makes a tacit admission of this by purporting to abdicate some of the most offensive terms.

For example, the defendants stipulated to give the arbitrator the power to award costs and attorney fees to the prevailing party; they stipulated to allow the arbitrator to impose injunctive relief; they stipulated that they, the defendant, would pay the filing fees; they stipulated that the arbitrator could award an unlimited amount of compensatory damages.

The Court finds this series of stipulations to be very curious. Surely the defendant does not purport to now unilaterally modify the written contract upon which they rely. For the defendant to even suggest this supports the very proposition that they, the defendants, are in a superior position, and that the relative positions of the parties are unequal.

In point of fact this is an adhesion contract, designed and drafted by the defendants, and as bad as that may be, it is worse that they purport to unilaterally fix what is clearly wrong with it.

Some of these terms are indeed among the ones that are unreasonably favorable to the defendants, and that show their unequal bargaining position.

Still remaining, however, are other unresolved issues. The subject clause precludes class treatment. This Court is unpersuaded that the Alabama Rules of Civil Procedure can be modified by a contract, but the defendant's attempt to do so goes to the unconscionability of the contract. Class actions are often the only means of relief for consumers in cases involving amounts of money so small that individual cases are not economically feasible.

The punitive damages available to the plaintiff are limited to five times the economic damages. The Supreme Court of the United States has declined to adopt an arithmetic formula; the Supreme Court of Alabama has declined to adopt an arithmetic formula; our legislature has adopted a tort reform package which rejected this approach. Surely a large corporate defendant cannot impose these terms.

Additionally, the contract purports to allow the defendant to use the Court system to collect amounts up to $10,000.00,

which, according to the testimony in this case, would include most of their loans. The Court is aware that our Supreme Court has rejected lack of mutuality as a basis for denying arbitration. However, the lack of mutuality is appropriate for this Court to consider in evaluating the basic fairness of this agreement.

Alabama statutory and common law vest this Court with the power to ". . . refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result."

Accordingly, the Court finds that the provisions of the subject contracts which purport to require arbitration of the disputes arising out of those contracts, are unconscionable as a matter of law.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the provisions of the subject contracts which purport to require arbitration of the disputes arising out of those contracts are void, and of no force and effect. Whereas substantial injustice would occur to the defendants if they could not otherwise enforce their contracts, the Court specifically addresses only the arbitration provisions, leaving in place all other rights and remedies of the parties that may exist under the law and the contract.

DONE AND ORDERED this the 24th day of January, 2000.

/s/ Marvin Wiggins
Marvin Wiggins, Circuit Judge

FILED
JAN 31, 2000

BETTY GAYLE PATE, CLERK
HALE COUNTY, ALABAMA

Supreme Court, U.S.
FILED
AUG 28 2001
OFFICE OF THE CLERK

(2)

No. 00-1934

IN THE

Supreme Court of the United States

American General Finance, Inc.,
Merit Life Insurance Co., and
Yosemite Insurance Company,

Petitioners,

v.

Mable Branch,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barry A. Ragsdale
(Counsel of Record)
Garve W. Ivey, Jr.
Ivey & Ragsdale
1615 Financial Ctr.
505 North 20th Street
Birmingham, AL 35203
205/327-5223

Michael J. Quirk
F. Paul Bland, Jr.
Trial Lawyers for Public Justice , P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
202/797-8600

30 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Parties' Loan Transaction 2

B. The Loan Transaction in the *Reaves* Case 3

C. American General Finance's Mandatory Arbitration Clause 4

D. The State Trial Court Proceedings 6

E. The Alabama Supreme Court's Holding 9

ARGUMENT 10

I. The Decision of the Court Below is Consistent with *First Options* and Other FAA Cases Addressing Arbitration of "Arbitrability" Disputes 11

II The Holding that Petitioner's Arbitration Clause is Unconscionable is Both Fact-Specific and Consistent with Prevailing Authority on State Contract Law and Federal Preemption 16

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

Abram Landau Real Estate v. Benova, 123 F.3d 69 (2nd Cir. 1997) 15

Alexander v. Standard Oil, 423 N.E.2d 578 (Ill. 1981) ... 21

Armendariz v. Foundation Health Psychare Services, Inc., 6 P.3d 669 (Cal. 2000) 19

Arnold v. United Companies Lending Corp., 511 S.E.2d 854 (W. Va. 1998) 19

Cole v. Burns Int'l Security Serv's, 105 F.3d 1465 (D.C. Cir. 1997) 20

DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) 20

Derrickson v. Circuit City Stores, Inc., 81 Fair Empl. Prac. Cas. 1553 (D. Md. 1999), *aff'd* 203 F.3d 821 (4th Cir.) (table), *cert. denied*, 530 U.S. 1276 (2000) 20-21

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 16-17, 23

Doctor's Associates, Inc. v. Hamilton, 150 F.3d 157 (2nd Cir. 1998) 22-23

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 13-14

Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997) 20

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 17, 23

Hull v. Norton, 750 F.2d 1547 (11th Cir. 1985) 20

Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir. 1999) 21-22

Lane v. Garner, 612 So.2d 404 (Ala. 1992) 9, 17

Lloyd v. Service Corp. of Ala., 453 So.2d 735 (Ala. 1984) 17-18

Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp.2d 1087 (W.D. Mich. 2000) 20

Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985) 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 17

Painewebber, Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996) .. 15

Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998) 20

Perez v. Globe Airport Security Services, 253 F.3d 1280 (11th Cir. 2001) 20

Perry v. Thomas, 482 U.S. 483 (1987) 23

Prevot v. Phillips Petroleum Co., 133 F. Supp.2d 937 (S.D. Tex. 2001) 14

Prima Paint Corp. v. Flood & Conklin Mfg Co., 388 U.S. 395 (1967) 1, 12-14

Showmethemoney Check Cashers, Inc. v. Williams, 27 S.W.3d 361 (Ark. 2000) 19-20

Taylor v. Leedy & Co., 412 So.2d 763 (Ala. 1982) 18

United Food and Commercial Workers Union v. Lucky Stores, Inc., 806 F.2d 1385 (9th Cir. 1986) 15

Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post, 959 F.2d 288 (D.C. Cir. 1992) 14-15

We Care Hair Development, Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999) 22

Statutes and Regulations:

Alabama Uniform Commercial Code, AL St. 7-2-302 ..... 7, 16, 17, 23

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ..... *passim*

9 U.S.C. § 2 ..... *passim*

9 U.S.C. § 3 ..... 1, 12

9 U.S.C. § 4 ..... 1, 11

Labor-Management Relations Act, 29 U.S.C. § 185 14

INTRODUCTION

The opinion of the Alabama Supreme Court in this case and the questions presented in the Petition for Certiorari do not warrant a grant of this Court's discretionary review. The holding of the court below was highly fact-specific, based on particular terms of the contractual arbitration provision at issue and on a detailed evidentiary record as to contract formation between these two parties. Indeed, the court below held that the same mandatory arbitration clause was fully enforceable based on different facts relating to contract formation in the companion case of *American General Finance, Inc. v. Reaves*. *See* Pet. 28a-29a. The narrow scope of the holding below thus belies Petitioner's contention that this case is worthy of review because the court below exhibited a "general anti-arbitration bias." Pet. 3. It did nothing of the sort.

Nor does the opinion below conflict with authority from this or other courts on the questions presented. The Alabama Supreme Court held consistent with Sections 2 through 4 of the Federal Arbitration Act and this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (1967), that a court must decide whether an asserted arbitration clause is a valid and enforceable contract before a party can be ordered into arbitration pursuant to it. Likewise, the court's holding that Petitioner's mandatory arbitration clause is unconscionable under the general standards of Alabama's Uniform Commercial Code as they apply to the facts of this case is consistent with decisions of courts across the country. Petitioner fails to identify any contrary authority holding either that a court may order arbitration under the FAA without determining whether the asserted arbitration agreement is unconscionable, or that the FAA preempts generally applicable rules of state contract law.

For these reasons, the Court should not grant review on either of the questions presented in the Petition for Certiorari.

STATEMENT OF THE CASE

Both the trial court and the Alabama Supreme Court below relied on extensive evidence pertaining to the one-sided formation and terms of the mandatory arbitration provision in Petitioner American General Finance's sub-prime loan contract with Respondent Mable Branch to hold that it is unconscionable and cannot be enforced in this case. The fact that the Alabama Supreme Court upheld the very same arbitration clause in the companion case demonstrates that the holding here is limited by the *combination* of the particularly one-sided terms of this arbitration provision and the detailed evidence of American General's control over formation of this contract with Ms. Branch. The holding of the court below is also consistent with decisions of this Court and courts across the country regarding who decides whether an asserted arbitration agreement is unconscionable as a matter of state contract law and regarding the propriety of a party's use of its overwhelming bargaining power to impose a one-sided dispute resolution system that unilaterally limits another party's legal remedies.

A. The Parties' Loan Transaction.

Over the year and a half period from July 1996 to November 1997, Respondent Mable Branch took out a series of three short-term, high interest loans from Petitioner American General Finance, Inc. Ms. Branch borrowed money from American General in July 1996, October 1996, and November 1997. Pet. 2a. She was described by the trial court below as the kind of borrower to whom banks would not be expected to provide loans. *Id.* at 46a.

Through its loans to Ms. Branch, American General Finance is alleged to have collected excessive finance charges and unnecessary or excessive premiums for credit disability and life insurance. *Id.* at 5a. American General also is alleged to have sold duplicative services to Ms. Branch by "flipping" her loans whereby she was induced to refinance existing loans at additional costs. *Id.*

As a condition for obtaining its sub-prime loans, American General required Ms. Branch to give up her right to sue in court and instead submit any future claims she might have against the lender to binding arbitration. American General drafted all of the documentation for these loan transactions. Ms. Branch had no input into the content of these documents and had no meaningful choice regarding the arbitration requirement in seeking a loan through American General Finance. *Id.* at 25a-26a. At the time of Ms. Branch's loans between July 1996 and November 1997, either 14 or 15 out of the 16 finance companies listed in the Tuscaloosa region where Ms. Branch lived required that borrowers waive their right of access to court and submit any future legal claims they might have to binding arbitration as a condition for obtaining a loan. *Id.* at 26a.

B. The Loan Transaction in the *Reaves* Case.

April Reaves also took out a series of short-term, high-interest loans from American General Finance. Ms. Reaves alleged that she too had to pay high finance charges and unnecessary or excessive insurance premiums on her loans, and that she was faced with American General's sale of duplicative services through the practice of flipping loans. *Id.* at 5a.

Ms. Reaves obtained her loans from American General in December 1994 and again in November 1995, before Ms. Branch ever obtained any of her loans. *Id.* at 2a. During this period when Ms. Reaves was borrowing, most finance companies listed in the geographic area where she lived did not require borrowers to submit to arbitration as a condition for receiving their loans. *Id.* at 28a. By borrowing from American General, Ms. Reaves submitted to the company's binding requirement of binding arbitration of all her future legal claims.

C. American General Finance's Mandatory Arbitration Clause.

The mandatory and binding arbitration requirement in American General's finance papers with Ms. Branch initially appears to apply to all claims by either party. The arbitration provision begins: "Borrower and lender agree that, except as otherwise set forth herein in this provision, all claims, disputes, or controversies of every kind and nature between Borrower(s) and Lender shall be resolved by arbitration." *Id.* at 2a. But several paragraphs later, near the end of the arbitration clause, American General reserves only for itself the right to sue in court for virtually any claim it could have against Ms. Branch:

> Borrower(s) and Lender agree that, notwithstanding the foregoing, Lender retains the right to use judicial or self-help remedies (i) to repossess or foreclose on collateral or to enforce the security interests relating to this transaction, and (ii) to pursue collection actions against the Borrower(s) where the amount of the debt is $10,000 or less.

Id. at 4a. Based on the size of Ms. Branch's loans, this saves from the arbitration requirement every foreseeable claim that American General could ever bring against Ms. Branch.

American General's protection of its own right to sue Ms. Branch in court does not extend to any counterclaims raised by Ms. Branch in such suits. Instead, American General retains sole control over the forum for such counterclaims by reserving the right to compel arbitration separate and apart from the litigation of American General's claims against Ms. Branch:

> The exercise of this right by Lender to pursue judicial or self-help remedies shall not constitute a waiver of Lender's right to compel the arbitration of any claim or dispute subject to this arbitration clause—including the filing of a counterclaim by Borrower(s) in a lawsuit filed by Lender.

Id. American General's arbitration clause with Ms. Branch also provides that "**all issues and disputes as to the arbitrability of claims must also be resolved by the arbitrator.**" *Id.* at 3a (emphasis in original).

In addition to the unilateral waiver of Ms. Branch's right to sue in court, American General's arbitration clause imposes limits on the legal remedies that are available to Ms. Branch in arbitration. The arbitration clause limits the amount of punitive damages for which American General may be held liable to Ms. Branch in arbitration without regard to the degree of culpability of its conduct:

> BORROWER(S) AND LENDER AGREE THAT THE ARBITRATOR MAY AWARD PUNITIVE DAMAGES ONLY UNDER CIRCUMSTANCES WHERE A COURT OF COMPETENT JURISDICTION COULD AWARD SUCH DAMAGES. HOWEVER, IN NO EVENT SHALL AN AWARD OF FIVE (5) TIMES THE ECONOMIC LOSS SUFFERED BY THE PARTY.

Id. at 3a-4a. This arbitration provision also imposes a unilateral prohibition on Ms. Branch's participation in any class action proceedings involving the lender: "BORROWER(S) AND LENDER FURTHER AGREE THAT THE ARBITRATOR SHALL NOT CONDUCT ANY CLASS-WIDE PROCEEDINGS AND WILL BE RESTRICTED TO RESOLVING THE INDIVIDUAL DISPUTES BETWEEN THE PARTIES." *Id.* at 4a.

Finally, American General's arbitration clause requires that any arbitration between American General and Ms. Branch shall be conducted according to the commercial rules of the American Arbitration Association. *Id.* at 3a. It further specifies that "[e]ach party shall pay one-half of the arbitration costs and expenses" of such commercial proceedings. *Id.*

D. The State Trial Court Proceedings.

Mabel Branch sued American General Finance, Merit Life Insurance Company, and Yosemite Insurance Company in June 1998 in the Hale County, Alabama Circuit Court alleging that American General's predatory lending practices described above violated Alabama statutory and common law. April

Reaves filed suit against these defendants in September 1998, making substantially the same allegations. *Id.* at 5a.

Petitioners moved the trial court to compel arbitration of both actions based on the mandatory arbitration provision in American General's loan documents. *Id.* The trial court consolidated the two cases for purposes of resolving the arbitration issue. *Id.* at 40a. Ms. Branch and Ms. Reaves argued in response to Petitioners' motions to compel arbitration that the arbitration clause was unconscionable and therefore unenforceable against them as a matter of general Alabama contract law. After allowing discovery on the arbitration issues, the trial court issued its decision on these motions based on an extensive evidentiary record. *Id.* at 40a.

The court first determined that it must apply general state contract law to decide whether or not the parties had agreed to arbitrate before it could address any assertion as to the scope of American General's arbitration clause. *Id.* at 41a. The court then applied Section 2-302 of Alabama's Uniform Commercial Code, which states the general rule that:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause...

AL St. 7-2-302. Pursuant to Alabama Supreme Court precedent on contractual unconscionability outside the arbitration context, the trial court considered whether there was unequal bargaining power and an absence of meaningful choice by one party in the

making of the asserted agreement to arbitrate, and whether the terms of American General's arbitration clause were patently unfair and unreasonably favorable to itself as the controlling party. Pet. 42a.

In addressing these factors, the trial court held that American General's arbitration clause was unconscionable as it would apply in both cases because neither borrower had any meaningful choice as to arbitration and because its terms unreasonably favored American General. Pet. 46a-48a. In support of its finding that Ms. Branch and Ms. Reaves had no meaningful choice, the trial court cited to a number of facts specific to these cases, including admissions by American General that it made arbitration a mandatory condition for its loans; stipulations by other area sub-prime lenders that they too required arbitration during the period in question; and testimony that the borrowers would not have been able to obtain loans from a bank. Pet. 46a. In finding the terms of the arbitration clause to be substantively unfair and unreasonably favorable to American General, the trial court cited to the lack of mutuality in the clause in allowing the lender to sue on nearly all of its possible claims, the unilateral cap on punitive damages that borrowers may recover, and the prohibition on class actions by borrowers. *Id.* at 47a-48a. The trial court also emphasized that American General's stipulation purporting to waive certain contractual prohibitions was further evidence both that the terms of the arbitration clause were unreasonable and that it was an adhesive contract subject to American General's complete control. *Id.* at 47a.

E. The Alabama Supreme Court's Holding

The Alabama Supreme Court affirmed the trial court's judgment in part by holding that American General's arbitration clause is unconscionable only as it applies to Ms. Branch. The court first affirmed that the unconscionability of the arbitration clause is a threshold issue for the court to decide before the parties can be ordered to arbitrate, and that the provision for arbitration of arbitrability disputes takes effect only after a court determines that the arbitration clause itself is enforceable. *Id.* at 20a-21a. The court then held that the trial court correctly applied the indicia of unconscionability under general Alabama contract law, reiterating the factors it had identified nearly ten years earlier in a case not involving arbitration:

> (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided or patently unfair terms in the contract.

Id. at 21a (quoting *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1992)).

With regard to consumer choice and bargaining power in the formation of this particular arbitration provision, the court found that Ms. Branch had no meaningful choice as to arbitration because American General had insisted on it as a condition of the loans, as did all but one or at most two area lenders at the time of these loans. Pet. 27a. The court found that Ms. Branch had no meaningful choice as to arbitration because she would have had to expend considerable time and

effort to find any alternative. *Id.* at 27a. With regard to the substantive terms of American General's arbitration clause, the court focused on the clause's non-mutual nature in preserving American General's right of access to court for every foreseeable claim it might have against Ms. Branch; the scope of the unilateral arbitration provision in applying to every conceivable claim of Ms. Branch (including claims regarding arbitrability); and the punitive damages cap which would also apply unilaterally to Ms. Branch's claims in arbitration but not to American General's claims in court. *Id.* at 22a-24a. The court emphasized that the *combination* of these provisions, plus the absence of meaningful choice by Ms. Branch, rendered the arbitration clause unconscionable in this case. *Id.* at 24a-25a.

In the same opinion, the Alabama Supreme Court held that American General's arbitration clause should be enforced against April Reaves because she had failed to demonstrate an absence of meaningful choice on her part as to arbitration. The court found that lenders requiring arbitration were a minority where Ms. Reaves was living at the time she secured all of her loans and therefore that she could have found an arbitration-free loan without considerable cost or effort. *Id.* at 28a. The court thus enforced American General's mandatory arbitration provision in her case despite its sweeping and one-sided terms.

ARGUMENT

There is no reason for this Court to review the narrow and fact-specific holding of the Alabama Supreme Court in this case. The court below focused on and limited its holding to the detailed evidence regarding formation of this contract between Petitioner and Respondent. Furthermore, the opinion of the court below is consistent with this Court's decisions and those

of appellate courts from around the country on both of the questions presented. Petitioner has not identified a single case where a court ordered a party into arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, for the threshold determination of whether the asserted arbitration clause that would be the only basis for such an order is unconscionable and therefore unenforceable. Furthermore, Petitioner has produced no authority for its contention that the FAA preempts a State court's application of established and generally applicable principles of unconscionability under the State's Uniform Commercial Code to a contractual arbitration provision. The Court therefore should not take up either of the questions presented in the Petition for Certiorari.

I. The Decision of the Court Below is Consistent with *First Options* and Other FAA Cases Addressing Arbitration of "Arbitrability" Disputes.

The Alabama Supreme Court's holding that a court must resolve attacks on the validity of an arbitration clause, including its provision for arbitration of arbitrability disputes, before the court may order a party into arbitration is a routine application of the Federal Arbitration Act's express provisions and this Court's interpretations of the Act. Section 2 of the FAA states that contractual arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Likewise, Section 4 empowers courts to compel arbitration of particular disputes only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4.

Based on these requirements of the FAA, this Court has drawn a sharp distinction between issues related to the validity of an arbitration agreement, which a court must decide before it can order arbitration of a dispute, and other issues relating to contracts with arbitration provisions, which may be reserved for the arbitrator if the arbitration clause itself is enforceable. In *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (1967), the Court held that a claim of fraud in the inducement of a contract containing an arbitration clause is subject to arbitration, but that a claim of fraud in the inducement of an arbitration clause is for a court to decide under the FAA. *Id.* at 403-04.[1] The Court explained in *Prima Paint*:

> This position is consistent...with the [FAA's] statutory scheme. As the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract —a situation inconsistent with the "saving clause."

---

[1] Although Section 4 of the FAA applies to independent actions to compel arbitration, *Prima Paint* held that the same rules apply to motions under Section 3 to stay litigation on a claim and compel arbitration because it would be "inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court." *Id.* at 404.

Id. at 404 n.12.[2] The lower court's decision in this case regarding who decides under the FAA whether a contractual arbitration clause is valid and enforceable adheres to *Prima Paint*, and Petitioner has identified no authority to the contrary.

Petitioner's attempt to establish a conflict between the holding in this case and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), fails because the two decisions address significantly different issues. In *First Options*, it was undisputed that there was a valid arbitration agreement between a stock trade clearing firm and a wholly owned investment company. *Id.* at 940-41. The parties' disagreement was about whether the *scope* of the arbitration clause was broad enough to cover a claim by the clearing firm to recover the company's debts from its owners, and whether a court or an arbitrator should decide this dispute over the scope of the arbitration agreement. *Id.* In answering the second question, this Court held that a court should ordinarily decide whether a particular dispute is covered by an arbitration clause, but recognized that parties may by "clear and unmistakable language" allow an arbitrator to make such an arbitrability determination. *Id.* at 944-45. Since the dispute in *First Options* involved the scope of a presumptively valid arbitration clause, the Court there had no reason to revisit the issue decided in *Prima Paint* and raised in the instant case of whether a party may be ordered into arbitration *before* there is a determination that the asserted arbitration agreement (which would be the only basis for such an order) is a valid and enforceable contract.

---

[2] *See also Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 867 (7th Cir. 1985) ("although section 4...speaks only of challenges to 'the making' of the agreement to arbitrate, the term has been held to encompass any challenge to the validity of the agreement, even if there is no disagreement that it was 'made.'")

The decision below is thus consistent with *Prima Paint* and *First Options* in holding that a court must decide whether an arbitration clause, even one that provides for arbitration of arbitrability disputes, is a valid and enforceable contract before it may order arbitration of any dispute. *First Options* nowhere purports to overturn or modify *Prima Paint*. Indeed, *First Options* never even discusses *Prima Paint* or the FAA's provisions that apply to disputes over the making and enforceability of contractual arbitration clauses like that in the instant case. Since Respondent's unconscionability argument goes to the making and original validity of the asserted arbitration clause, it was properly resolved by the court under the FAA's provisions that this Court applied in *Prima Paint*.[3]

Having failed to demonstrate any conflict between *First Options* and the decision of the Alabama Supreme Court below, Petitioner identifies no other decision that would create a split of authority on its first question presented. In *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post*, 959 F.2d 288 (D.C. Cir. 1992), the court ordered arbitration of the parties' dispute over whether the arbitration clause in their collective bargaining agreement applied to certain of the employer's pay-scale decisions. This was a dispute over the scope, not the making and validity, of the arbitration clause. Furthermore, this labor relations dispute was governed by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and thus gave the court no occasion to examine the

---

[3] *See also Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939 (S.D. Tex. 2001) (case where injured workers did not speak English at time of alleged arbitration "agreement," holding that unconscionability argument against enforcement of arbitration clause is for court to decide under *Prima Paint* even where clause provides for arbitration of arbitrability disputes).

Federal Arbitration Act's provisions regarding the making of agreements to arbitrate. Likewise, in *United Food and Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385 (9th Cir. 1986), the court ordered arbitration over whether a union's grievance complied with the specificity requirements of a collective bargaining agreement's arbitration clause. This case too involved an interpretation of an arbitration agreement, not a determination as to its underlying validity, and did not involve the sections of the FAA that apply to this case.[4]

In sum, the court below held that a party cannot be forced into arbitration under the Federal Arbitration Act until a court has first determined that an asserted arbitration agreement, including one that provides for arbitration of arbitrability disputes, is a valid and enforceable contract under generally applicable state law. Petitioner has identified no case holding to the contrary and therefore has established no basis for this Court to grant review on the first question presented.

---

[4] Petitioner cites several cases in a footnote, *see* Pet. at 11-12 n.4, which state generally that disputes over the validity and enforceability of arbitration clauses involve issues of "arbitrability." But none of these cases conflict with the decision of the court below by holding under the FAA that parties must go to arbitration to find out whether or not they entered into a valid and enforceable arbitration agreement in the first place. *See, e.g.*, *Abram Landau Real Estate v. Benova*, 123 F.3d 69, 72 (2nd Cir. 1997) (labor relations case holding that question of on-going application of arbitration clause was arbitrable because it required interpretation of other bargaining agreement provisions, while noting parties' agreement over original validity and applicability of arbitration clause); *Painewebber, Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) (holding that question of whether investors' fraud claims were time-barred by NASD arbitration rules is presumptively for arbitrator to decide and is *not* a question of arbitrability).

II. The Holding that Petitioner's Arbitration Clause is Unconscionable is Both Fact-Specificand Consistent with Prevailing Authority on State Contract Law and Federal Preemption.

Petitioner confuses the highly fact-specific holding of the Alabama Supreme Court regarding the enforcement of its contractual arbitration provision in this case for a generalized attack on all arbitration agreements in all cases. The court below applied Section 2-302 of the State's Uniform Commercial Code to hold that Petitioner's arbitration clause is unconscionable based on the combination of its particularly one-sided terms and the detailed evidence showing that Respondent had no meaningful choice as to arbitration in the making of this loan contract. The limitation of this decision to this combination of facts is demonstrated by the court's holding in the companion case that the same one-sided arbitration clause was enforceable against another borrower who was shown to have greater choice as to arbitration at the time of her loans. Pet. 28a-29a. The decision below is neither a broad-based attack on arbitration in general nor even an attack on all applications of this particularly one-sided arbitration provision. Instead, it is a narrow application of general rules of Alabama contract law to the specific facts presented in this case.

The Alabama Supreme Court's decision below is consistent with the command of the Federal Arbitration Act and this Court's opinions interpreting the Act to subject contractual arbitration provisions to the same rules of state law that apply to other contracts. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court explained that Section 2 of the FAA places arbitration agreements on the same footing with other contracts so that "generally applicable contract defenses

such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 687. Likewise, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court noted Section 2's savings provision and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provides grounds for the revocation of any contract.'" *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). The court below did just this, applying previously recognized and generally applicable indicia of unconscionability under the Alabama U.C.C. and finding these indicia to have been established through a detailed evidentiary record.

The Alabama Supreme Court held that Petitioner's arbitration clause is unconscionable in this case under indicia of unconscionability that the court had recognized nearly ten years earlier in a case that did not involve arbitration. Pet. 21a (citing *Layne v. Gardner*, 612 So.2d 404, 408 (Ala. 1992). The court based its finding that Respondent had no meaningful choice as to arbitration and was subject to Petitioner's overwhelming bargaining power on an evidentiary record which demonstrated that nearly every area lender required arbitration during the time period in question and that Petitioner had made arbitration a mandatory condition for its loans. Pet. 26a-28a. Petitioner mistakenly asserts that the court below had never ruled outside the context of arbitration that market prevalence is relevant to the issue of consumer choice as an indicium of unconscionability, Pet. 19. In *Lloyd v. Service Corp. of Ala.*, 453 So.2d 735 (Ala. 1984), the Alabama Supreme Court did precisely this regarding the use of exculpatory clauses in landlord-tenant contracts, finding that:

> 'The tenant has no meaningful choices. He can accept this landlord or go to another landlord who charges the same rent and asks the tenant to sign the same standard form lease. In other words, the modern standard form lease is in essence an adhesion contract. A survey of residential leases in Alabama would show that almost all contain these exculpatory clauses.'
>
> ...That consumer, in need of goods or services, is frequently not in a position to shop around for better terms, because all competitors use the same clauses.

Id. at 739 (quoting *Taylor v. Leedy & Co.*, 412 So.2d 763, 766 (Ala. 1982) (Faulkner, J., concurring specially).[5] The court's finding of procedural unconscionability in contract formation is thus both fact-specific to this case and well-supported under established principles of general Alabama contract law.

---

[5] Petitioner also mistakenly suggests that the court below ignored its previous cases by finding unconscionability even though Ms. Branch is an educated and sophisticated consumer. Pet. 16. This argument is flatly contrary to the facts in the record: Ms. Branch is a self-employed beautician in a rural community who took two years of cosmetology classes at a local vocational school. Prior to working as a beautician, she was employed as a laborer constructing wooden pallets. She testified in the case that she did not understand the loan documents in the case, and specifically did not understand the language of the arbitration clause. For example, Ms. Branch testified that she does not understand the meaning of the word "litigate." In light of this detailed record which conflicts with Petitioner's characterization of the facts, there is no occasion for this Court to second-guess the integrity of the Alabama Supreme Court's analysis of how Alabama contract law applies to these facts.

Even in the absence of meaningful choice as that term is defined under Alabama contract law, Petitioner's arbitration clause would likely have been enforced in this case had it not also diminished Respondent's substantive legal rights by imposing a unilateral cap on her recovery of damages. The Alabama Supreme Court nowhere said that market prevalence of a contractual term *by itself* renders the term unconscionable. Instead, the court invoked widely recognized standards of substantive unconscionability in holding that the terms of Petitioner's particular arbitration clause are one-sided and unreasonably favorable to American General.

The court emphasized the scope of the arbitration clause as it would require arbitration of all of Respondent's claims (including those relating to arbitrability), while carving out from this requirement every foreseeable claim that Petitioner might ever have, and the fact that Respondent alone would be subject to unilateral remedial limitations in arbitration. Pet. 22a-24a. A sizable body of case law from courts around the country has similarly treated such non-mutuality as an indicium of unconscionability.[6] Numerous courts have also recognized

---

[6] *See, e.g., Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669, 692-94 (Cal. 2000) (arbitration clause in employment contract is unconscionable where it applies only to employee's claims and places unilateral limits on employee's damages: "The unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer."); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 861-62 (W.Va. 1998) (holding arbitration provision in lender's contract with elderly couple unconscionable where lender "like rabbit and foxes" affected a "wholesale waiver of the Arnolds' rights together with the complete preservation of United Lending's rights.") (quotation omitted) *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 365-66 (Ark. 2000) (payday lender's arbitration

that arbitration provisions which limit a party's access to legal remedies that are available in court may be unenforceable.[7]

---

clause is unenforceable under Arkansas contract law for lack of mutuality where lender's collection claims are exempted but all of the borrower's claims are covered); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (arbitration clause in employment contract is unenforceable under Indiana law for want of consideration where clause applies to employee's claims but exempts employer's claims); *Hull v. Norton*, 750 F.2d 1547, 1550-51 (11th Cir. 1985) (arbitration provision in employment contract is unenforceable under New York law for want of consideration where employer reserves own right to sue in court; court finds no preemption because case falls within Section 2 savings clause).

[7] *See, e.g., Cole v. Burns Int'l Security Serv's*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (arbitration must offer "all the types of relief that would otherwise be available in court"); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of court) (arbitrability of Title VII claims "rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable."); *Perez v. Globe Airport Security Services*, 253 F.3d 1280, 1286-87 (11th Cir. 2001) (holding arbitration clause that prevents prevailing Title VII plaintiff from recovering attorney's fees to be unenforceable); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (voiding arbitration clause disallowing attorneys' fees for prevailing Title VII plaintiff, concluding that "contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087, 1105 (W.D. Mich. 2000) (finding as to consumer Truth In Lending Act and state consumer protection act claims that "both federal and Michigan case law support a conclusion that an arbitration provision is substantively unconscionable because it waives class remedies, as well as declaratory and injunctive relief"); *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. 1533 (D. Md. 1999) (arbitration clause capping punitive damages and back pay remedies under Section 1981 is unenforceable), *aff'd*, 203

These cases hold not that all or most arbitration clauses are unconscionable, but only that particular types of arbitration provisions similar to those found here may be unconscionable in certain cases. The holding of the court below is thus consistent with case law recognizing the need for courts to enforce general principles of state contract law in unusually one-sided and unfair circumstances in order to prevent businesses from abusing their bargaining power by turning private arbitration proceedings into an occasion to diminish unilaterally the substantive legal rights of individual consumers.

Petitioner has identified no authority that conflicts with the Alabama Supreme Court's decision or supports the extraordinary contention that preemption under the FAA extends to prohibit enforcement of established standards of unconscionability under a State's Uniform Commercial Code. In *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), the court held that an arbitration provision in an employment contract was not unconscionable as a matter of Illinois contract law whether or not it was adhesive because there had been no attempt to show that its terms were substantively unfair. *Id.* at 367 ("'the disparity in the size of the parties entering into the agreement...without some wrongful use of that power,' is not enough to render an arbitration agreement unenforceable.'") (quoting *Alexander v. Standard Oil*, 423 N.E.2d 578, 580 (Ill. 1981)). These requirements are entirely consistent with the unconscionability standards applied by the Alabama Supreme Court based on the very different contract in this case. Both decisions closely examine disparities in bargaining power during contract formation and substantive unfairness in the terms of the arbitration clause. What's more,

---

F.3d 821 (4th Cir.) (table), *cert. denied*, 530 U.S. 1276 (2000).

since *Koveleskie* turned on interpretations of Illinois contract law, any perceived difference with the decision below would not give rise to a question of federal law in any event.[8] Finally, while *Koveleskie* stated in dicta that a hypothetical state rule prohibiting enforcement of all pre-dispute arbitration agreements would be preempted by the FAA, *supra* at 367, this in no way conflicts with the instant case because the court below never intimated such a rule and in fact *enforced* a pre-dispute arbitration clause in the companion case.

Likewise, Petitioner's discussion of the Second Circuit's opinion in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2nd Cir. 1998), establishes no conflict with the decision of the court below here. First, the court in *Hamilton* rejected the defendant's unconscionability argument not because it was preempted but because the party had waived the argument by failing to raise it in the trial court. *Id.* at 164. *Hamilton* did hold that a state statute prohibiting forum selection clauses in franchise contracts was preempted to the extent that it would operate to prohibit enforcement of an arbitration provision in such a contract. *Id.* at 163. But the court found that there was preemption under Section 2 of the FAA because this statutory rule was not generally applicable; rather it "applies to one sort of contract provision (forum selection) in only one type of

---

[8] For the same reason, Petitioner's reliance on *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999), invokes no question of federal law. The Seventh Circuit there again applied Illinois contract law to find that a franchise agreement's arbitration provision was not unconscionable based solely on its non-mutual nature. *Id.* at 843. It is also noteworthy that the court in *We Care* emphasized the relative equality in bargaining power between parties to a franchise contract, noting that "the franchisees were not vulnerable consumers or helpless workers, but rather business people who bought a franchise." *Id.* (internal quotation omitted).

contract (a franchise agreement)." *Id.* The rule of unconscionability invoked by the Alabama Supreme Court in this case, by contrast, applies to all contracts under the State's U.C.C. and has been recognized generally by this Court in *Gilmer* and *Casarotto* not to be preempted based on the savings clause in Section 2 of the FAA. *Hamilton* therefore does not in any way conflict with the holding in the instant case.[9]

The Federal Arbitration Act's goal of enforcing voluntary agreements to arbitrate is perfectly consistent with the Alabama Uniform Commercial Code's concern for ensuring meaningful choice and substantive fairness in the formation of contracts. Neither policy goal is satisfied where a borrower is forced to submit to arbitration in order to obtain any loan and where a lender abuses this advantage in bargaining power by imposing a one-sided arbitration requirement that unilaterally restricts the borrower's available legal remedies. The holding of the court below was narrowly based on a detailed factual record on each of these points and does not conflict with decisions of this or other courts on the scope of FAA preemption. This case therefore does not warrant this Court's discretionary review on either of the questions presented.

---

[9] The argument herein that *Hamilton* does not conflict with the holding of the court below is in no way a concession that *Hamilton* was correctly decided under this Court's FAA preemption rulings. The anti-forum selection clause statute in *Hamilton* neither "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987), nor creates "threshold limitations placed specifically and solely on arbitration provisions," *Casarotto*, 517 U.S. at 688. Still, that question is not presented in the instant case because the unconscionability ruling of the court below is neither limited to specific types of contracts nor to specific types of contractual clauses.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Barry A. Ragsdale
(Counsel of Record)
Garve W. Ivey, Jr.
Ivey & Ragsdale
1615 Financial Center
505 North 20th Street
Birmingham, AL 35203
205/327-5223

Michael J. Quirk
F. Paul Bland, Jr.
Trial Lawyers for Public Justice , P.C.
1717 Massachusetts Ave., NW, Suite 800
Washington, D.C. 20036
202/797-8600

Counsel for Respondent

Date: August 28, 2001

(3)

Supreme Court, U.S.
FILED
AUG 28 2001
CLERK

No. 00-1934

IN THE

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC.,
MERIT LIFE INSURANCE CO., and
YOSEMITE INSURANCE COMPANY,

Petitioners,

v.

MABLE BRANCH,

Respondent.

On Petition for a Writ of Certiorari To the Supreme Court of Alabama

AMICI CURIAE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, CONSUMERS BANKERS ASSOCIATION, AND THE FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF PETITIONERS

STEPHEN M. TRUITT
Counsel of Record
DANIEL I. PRYWES
PEPPER HAMILTON LLP
600 Fourteenth Street, N.W.
Washington, DC 20005
(202) 220-1200

STEPHEN G. HARVEY
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(202) 835-9810

Attorneys for *Amici Curiae*
American Financial Services Association,
American Bankers Association,
Consumers Bankers Association, and
The Financial Services Roundtable

Dated: August 28, 2001

21 pp

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE COURT BELOW FASHIONED A SPECIAL TEST TO INVALIDATE AN ARBITRATION AGREEMENT BASED ON THE PREVALENCE OF SUCH AGREEMENTS IN AN INDUSTRY SECTOR AND BASED AS WELL ON OTHER ARBITRATION CLAUSE PROVISIONS WHICH THIS COURT HAS DECLARED TO BE ALLOWABLE UNDER THE FEDERAL ARBITRATION ACT 4

II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE TIDE OF STATE COURT RULINGS THAT CONFLICT WITH THIS COURT'S RULING THAT ARBITRATORS MAY BE GRANTED EXPRESS AUTHORITY TO RESOLVE DISPUTES OVER ARBITRABILITY .. 9

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 9, 15

Apollo Computer, Inc. v. Berg, 886 F.2d 469 (1st Cir. 1989) 11

Arnold v. United Cos. Lending Corp., 204 W. Va. 229, 511 S.E. 2d 854 (W. Va. 1998) 10

Berkley v. H&R Block Eastern Tax Servs., Inc., 30 S.W.3d 341, *applic. denied*, 2000 Tenn. Lexis 621 (Tenn. 2000), *cert. denied*, 121 S. Ct. 1602 (2001) 11

Chlor & Andre v. Piper, 261 Mont. 143 (S.C. 1993) 8

Conseco Fin. Servicing Corp. v. Wilder, 47 S.W. 3d 335 (Ky. 2001), 2001 Ky. App. LEXIS 60 (Ct. App.) 8

Crawford v. Results Oriented, Inc., 2001 Ga. LEXIS 446 (Ga. June 11, 2001) 10

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 3, 5

Dorsey v. H.C.P. Sales, Inc., 46 F. Supp.2d 804 (N.D. Ill. 1999) 11

First Options of Chicago v. Kaplan, 514 U.S. 938 (1995) ..... passim

Gannon v. Circuit City Stores Inc., 2001 U.S. App. Lexis 18713 (8th Cir. Aug. 17, 2001). 6

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) 12

Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513 (2000) 12

Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) 11

In re Oakwood Mobile Homes, Inc. 987 S.W.2d 571 (S.C. Tx 1999) 8

Moses H. Cone Memorial Hosp. v. Terminal Constr. Co., 460 U.S. 1 (1983) 4, 7

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001) 10

Paineweber, Inc. v. Bybyk, 81 F. 3d 1193 (2d Cir. 1996) . 11

Prevot v. Phillips Petroleum Co., 133 F. Supp.2d 937 (S.D. Tex. 2001) 11

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 4, 12, 13, 14

Results Oriented, Inc. v. Crawford, 245 Ga. App. 432, 538 S.E. 2d 73 (App. 2000), *aff'd* 10

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960) 14

Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974) 5

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) 15

Showmethemoney Check Cashers, Inc. v. Williams, 342 Ark. 112, 27 S.W. 3d 361 (Ark. 2000) 10

Southland Corp. v. Keating, 465 U.S. 1 (1987) 4, 7

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) 15

Williams v. Aetna Fin. Company, 83 Ohio St. 3d 464 (S.C. 1998) 8

Statutes and Acts:

9 U.S.C. § 2 (1999) 13

Federal Arbitration Act ..... passim

Other Authorities:

Alan S. Kaplinsky & Mark J. Levin, *Survey: Consumer Financial Services Arbitration: Current Trends and Developments*, 53 Bus. Law. 1075 (May 1998) ... 7

Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1001-02 (1996) 7

Steven J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (2001) 12

STATEMENT OF INTEREST

The American Financial Services Association ("AFSA") was established in 1916, and is the national trade association for market-funded providers of financial services to consumers and small businesses. These providers offer an array of financial services, including unsecured personal loans, automobile loans, home equity loans, and credit cards through specialized bank institutions. Since 1916, the membership of AFSA has grown to include over 500 companies that are in the business of serving the credit needs of consumers and small businesses.[1] Many of AFSA's members incorporate arbitration clauses in their loan agreements, and some but not all AFSA members include clauses providing that disputes over arbitrability are to be decided by the arbitrators.

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes – money center, regional and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks. ABA members regularly include arbitration agreements in their loan and other contracts.

The Consumer Bankers Association ("CBA") is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home

---

[1] This *amici* brief was authored by the undersigned counsel. No monetary contribution has been made to the preparation or submission of this brief by any person or entity other than AFSA. Petitioner American General Finance, Inc. is a member of AFSA, but has not contributed toward preparation or submission of this brief. Each of the parties has consented to the filing of this brief by *amici*. Copies of the consent letters have been filed with the clerk.

equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The Financial Services Roundtable ("Roundtable") consists of 100 of the largest integrated financial services companies in the United States. Established in 1912, the Roundtable delivers respected leadership on regulatory management and provides superior technology leadership in the areas of setting standards, enhancing consumer privacy and security and rationalizing infrastructure.

The ABA, the AFSA, the CBA and the Roundtable frequently appear as *amici curiae* in cases raising issues of widespread importance to the consumer finance industry.

SUMMARY OF THE ARGUMENT

Judicial hostility to arbitration has taken many forms, despite the Federal Arbitration Act's (the "FAA" or "Act") purpose to promote use of arbitration. Increasingly, courts are resisting arbitration agreements contained within standard, form contracts – such as consumer loan contracts – on grounds that the terms of the arbitration agreements are "unconscionable." Objections to arbitration agreements in standard form contracts have been based on a variety of procedural and substantive factors, including claims that: individuals have no choice because of the prevalence of arbitration agreements by other lenders; the arbitration provisions are inadequately explained; the arbitration fees are unreasonable; a distant location specified for the arbitration is unfair; there is no mutuality of remedy; the arbitration rules are

biased against the individual; or damages to claimants are unfairly limited.

This case presents important and recurring issues about (1) what factors may properly be considered in deciding such "unconscionability" challenges, and (2) who should decide the issue when the arbitration agreement contains an "arbitrability" clause stating that disputes over arbitrability should be decided by the arbitrators. The Alabama Supreme Court decision conflicts with rulings of other state supreme courts, as well as with this Court's rulings in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), and *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

First, the Court should review the ruling of the Alabama Supreme Court to establish that neither the widespread prevalence of arbitration clauses in an industry, nor "arbitrability" clauses, may be considered to be indicia of unconscionability. The Alabama Supreme Court violated this principle, as have other courts in the course of invalidating arbitration agreements as unconscionable. Many courts, however, recognize that arbitration clauses are not, by themselves, an indication of unconscionability. This latter view is the correct one, and is compelled by this Court's prior rulings that the Act's pro-arbitration policies extend fully to consumer contracts. Review is warranted because state supreme courts disagree on how to weigh the prevalence of arbitration agreements when evaluating claims of unconscionability, and the resulting uncertainty threatens to frustrate the Act's goal of promoting uniform use of arbitration in the context of consumer-loan contracts and a wide variety of other standard contracts that incorporate an agreement to arbitrate disputes.

Second, the Court should review the ruling below because it is the latest in a wave of state supreme court decisions that

have ignored or misconstrued this Court's decisions respecting "who" decides questions of arbitrability. The Alabama Supreme Court proceeded on its own to decide that an arbitration agreement was unconscionable, despite the presence of an "arbitrability" clause stating that such disputes should be decided by the arbitrators. Under the Court's *First Options* ruling, and the ruling in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), such an "arbitrability" clause should be enforced where, as here, it is expressed in clear and unmistakable terms and where there was not even an allegation (much less any finding) that the clause was unconscionable in its own right.

ARGUMENT

I. THE COURT BELOW FASHIONED A SPECIAL TEST TO INVALIDATE AN ARBITRATION AGREEMENT BASED ON THE PREVALENCE OF SUCH AGREEMENTS IN AN INDUSTRY SECTOR AND BASED AS WELL ON OTHER ARBITRATION CONTRACT PROVISIONS WHICH THIS COURT HAS DECLARED TO BE ALLOWABLE UNDER THE FEDERAL ARBITRATION ACT

In *Moses H. Cone Memorial Hosp. v. Terminal Constr. Co.*, 460 U.S. 1, 24 (1983), and *Southland Corp. v. Keating*, 465 U.S. 1, 12, 16 (1987), this Court clarified that state law, statutory or judge-made, cannot nullify the important goals of the Federal Arbitration Act. That Act evinces Congressional recognition that arbitration can resolve disputes at less cost while sacrificing no basic fairness to either party to the agreement. Thereby commerce is promoted. To gain this benefit, arbitration agreements were put on the same footing as other contracts, that is, made enforceable. Until the passage of the Act, many states refused to enforce such agreements, owing

to "centuries of judicial hostility" that the Act was intended to reverse.[2]

As with many important legislative declarations, the full beneficial sweep of the FAA was not immediately realized. Both legislative and "judicial hostility" to arbitration resurfaced seeking to undercut federal policy by special legislative requirements applicable only to arbitration clauses[3] and judicial gloss restricting the enforceability of such clauses.[4] This Court has resisted such developments in a number of cases and it is time to do so again.

The Alabama Supreme Court applied state law to invalidate an arbitration clause it found subject to the Federal Arbitration Act. In so doing, the court developed a special version of Alabama unconscionability rules which apply to arbitration clauses and them alone. According to the court, "the only substantive issue" before it was whether "the arbitration clauses were, themselves, unconscionable." App. 21a.[5] In answering this question, the court looked to Alabama's "two-pronged" test generally determining when contracts are unconscionable: "(1) terms that are grossly favorable to one party that has (2) overwhelming bargaining power." *Id.*

As to the first prong of the test, the court initially stated that the "breadth of the clause" itself was an index of

---

[2] *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

[3] *See Doctor's Assocs. Inc. v. Cassarotto*, 517 U.S. 681 (1996), invalidating Montana law conditioning an arbitration agreement's enforceability on compliance with a "first page notice requirement."

[4] *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

[5] References to "App." are to the Appendix to the Petition for Certiorari.

unconscionability. App. 22a. Thus, broad arbitration clauses – those that refer all or most disputes to the arbitrator for decision – are inherently suspect. Secondly, if the clause refers "threshold issues of arbitrability" to the arbitrator as well, this is further evidence that the first prong of Alabama's test is met. *Id.*[6]

These two badges of unconscionability under the first prong of Alabama's test – breadth of the arbitration clause and reference of arbitrability issues to the arbitrator for decision – apply to arbitration clauses and them alone. Accordingly, the formulation of this "prong" of Alabama's test is not a general part of its unconscionability law, but is peculiar to arbitration agreements and them alone.

On the "breadth" issue, the more that is committed to arbitration by contract, the more likely the clause is to be tainted, in the court's view. This cannot be squared with the policies of the FAA and is completely hostile to encouraging arbitration. The Act declares arbitration clauses to be enforceable, not just "narrow" arbitration clauses. An analysis based on the view that a broad arbitration clause is more "suspect" than a narrower one negates the Congressional policy declaring such agreements enforceable, *per se*.

---

[6] The court also stated that the limit on recovery of punitive damages, which was also in the arbitration clause, made the arbitration clause itself further suspect. The court did not explain why the arbitrator could not determine that this limit was valid or not under Alabama law. Accordingly, the court's observation presents no issue regarding the clause itself: the limit must be regarded as a party agreed rule of decision independent of the arbitration clause. As such, its inclusion goes to the validity of the contract as a whole, not the propriety of the arbitration clause itself. *See Gannon v. Circuit City Stores Inc.*, 2001 U.S. App. Lexis 18713 (8th Cir. Aug. 17, 2001).

The validity of an arbitration clause's reference of arbitrability itself to the arbitrator for decision – the second indicium of unconscionability according to the court below – was confirmed by this Court in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). This is what the clause here did. What is permitted by this Court's *First Options* decision cannot be undone by state law. The Supreme Court of Alabama, by converting activity protected under the FAA into a badge of unconscionability, runs directly afoul of *Moses H. Cone* and *Southland*, which hold that state law and procedure may not negate the FAA.

When the court proceeded to the second prong of Alabama's unconscionability test, "overwhelming bargaining power," it adopted a rule that categorically dooms standardized form arbitration clauses which, because of their popularity, are widely used.[7] According to the court, Alabama's "no-meaningful-choice" test is satisfied whenever the consumer faces an industry providing a product under form contracts which routinely include an arbitration clause along with other standardized clauses (acceleration, choice of law, attorney fees, etc.). Nothing further was required to establish that plaintiff "had no meaningful choice" and, thus, that the second prong of Alabama's unconscionability test was met with no further showing. App. 27a.

This aspect of the court's ruling particularly concerns *amici*. Prevalence of arbitration clauses in standardized

---

[7] The variety of challenges to arbitration terms in consumer loan contracts are described in Alan S. Kaplinsky & Mark J. Levin, *Survey: Consumer Financial Services Arbitration: Current Trends and Developments*, 53 Bus. Law. 1075 (May 1998); and Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1001-02 (1996).

contracts can neither brand an arbitration clause as invalid nor be an indispensable step in an argument lending to invalidity. *Amici's* members use standardized loan and related documentation which contain arbitration clauses. Wide use of such forms reduces transaction costs, avoids discrimination in loan terms, and benefits both the lenders *and* the borrowers as well. Courts considering whether the use of arbitration clauses in form contracts is valid have generally upheld these clauses.[8] Thus, both case law and the FAA policy repeatedly recognized by this Court favoring enforcement of arbitration agreements cannot be unraveled by state law analyses which employ the very success of such agreements *against* their enforceability.

The analysis of the court below simply ignored this Court's decisions which permit and encourage exactly what it condemned: broad arbitration clauses which can include reference of arbitrability issues themselves to an arbitrator for decision. By seizing on the wide acceptance of arbitration as a dispute resolution mechanism as a reason for throwing the parties back into the court system, the court below has achieved a result that can only be described as self-defeating: once the Congressional policy of encouraging arbitration is achieved, arbitration agreements are to be struck down. More importantly, it is directly contrary to this Court's decisions and

---

[8] *See Chlor & Andre v. Piper*, 261 Mont. 143 (S.C. 1993) (arbitration clause enforceable even when included in an adhesion contract), and *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W. 3d 335 (Ky. 2001), 2001 Ky. App. LEXIS 60 (Ct. App.) (inclusion of the arbitration clause was not abusive or unfair); *In re Oakwood Mobile Homes, Inc.* 987 S.W. 2d 571 (S.C. Tx 1999) (arbitration clause in adhesion contract not *per se* invalid).

Contrary: *Williams v. Aetna Fin. Company, d.b.a. I.T.T. Fin. Services*, 83 Ohio St. 3d 464 (S.C. 1998) (presumption favoring validity of arbitration clause weakened ". . .when there are strong indications the contract. . .is an adhesion contract").

the announced policy of making arbitration agreements enforceable, not subject to specialized rules designed to eliminate them from broad sectors of the economy. As cited by the dissent below: "The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing' directly contrary to the Act's language and Congress' intent." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE TIDE OF STATE COURT RULINGS THAT CONFLICT WITH THIS COURT'S RULING THAT ARBITRATORS MAY BE GRANTED EXPRESS AUTHORITY TO RESOLVE DISPUTES OVER ARBITRABILITY

In its 1995 decision in *First Options*, the Court addressed the question of "who" decides whether a dispute is arbitrable. It held that if the parties agreed by "'clear and unmistakable' evidence" to "submit the arbitrability question itself to arbitration," then "a court must defer to an arbitrator's arbitrability decision." 514 U.S. at 943, 944.

Since 1995, many courts have failed to apply the *First Options* ruling in cases where the arbitration agreement as a whole is attacked as unconscionable or invalid. The Alabama Supreme Court failed to do so below when it ruled that an arbitration agreement is "unconscionable" even where there is express contractual language stating that "all issues and disputes as to the arbitrability of claims must also be resolved by the arbitrator." (App. 3a.) That court proceeded to find that the arbitration agreement as a whole was unconscionable without first making any finding that the specific "arbitrability" clause – reserving "arbitrability" disputes to the arbitrators – was unconscionable or invalid on its own.

By its ruling, Alabama joined a growing list of other states whose highest courts have ruled that state courts can decide on their own whether an arbitration agreement is unconscionable even where the parties agreed upon an "arbitrability" clause that is not shown to be unconscionable or offensive in its own right. Many of these cases involve consumer loan agreements or other standardized contracts. *See, e.g., Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001) (court decides if arbitration agreement is unconscionable, despite "arbitrability" clause); *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 117, 27 S.W. 3d 361, 364 (Ark. 2000) (court decides arbitrability question, despite clause committing to the arbitrators the issue "whether the controversy or dispute is subject to arbitration," on basis of lack of mutuality of the general arbitration clause); *Results Oriented, Inc. v. Crawford,* 245 Ga. App. 432, 435, 538 S.E. 2d 73, 77 (App. 2000) (ruling that court may decide if an arbitration agreement is unconscionable despite "arbitrability" clause), *aff'd, Crawford v. Results Oriented, Inc.*, 2001 Ga. LEXIS 446 (Ga. June 11, 2001); *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 233, 511 S.E. 2d 854, 858 (W. Va. 1998) (court ruled that a consumer loan agreement's arbitration clause was unconscionable because it allowed the lender but not the borrower to seek judicial relief, in spite of language committing to the arbitrators disputes over "the validity and construction of the arbitration provision").

Several federal courts have also followed this trend.[9] These rulings appear to rest on the belief that it would be logically wrong to honor one part of an arbitration agreement – vesting "arbitrability" disputes to the arbitrator – until the court makes a prior determination that the arbitration agreement as a whole is valid.

Other courts, however, have concluded that a dispute over the validity of an arbitration agreement should be decided by the arbitrator when an "arbitrability" clause is present. *See, e.g., Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (because of "arbitrability" clause, arbitrators should decide whether the right to compel arbitration was "validly assigned" to the claimant); *Berkley v. H&R Block Eastern Tax Servs., Inc.*, 30 S.W.3d 341, 344 (Tenn. Ct. App.) ("Because the contract specifically states that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement . . . the parties must submit the question of arbitration to arbitration"), *applic. denied*, 2000 Tenn. LEXIS 621 (Tenn. 2000), *cert. denied*, 121 S. Ct. 1602 (2001). *See Paineweber, Inc. v. Bybyk*, 81 F. 3d 1193, 1202 (2d Cir. 1996) (language incorporated into arbitration agreement "commits all issues, including issues of arbitrability and timeliness, to the arbitrators").

The first and more numerous line of decisions are gutting the right of parties – recognized in *First Options* – to secure an

---

[9] *See, e.g., Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 177 (3d Cir. 1999) (court decided unconscionability issue despite "arbitrability" clause); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp.2d 937, 938, 941 (S.D. Tex. 2001) ("arbitrability" clause disregarded in ruling that arbitration agreement is procedurally unconscionable); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp.2d 804 (N.D. Ill. 1999) (court decides issue of "unconscionability" against borrower despite "arbitrability" clause).

efficient, arbitrated decision on the arbitrability of disputes, without a detour to court proceedings that may involve several levels of appellate review. Just as court decisions in earlier periods demonstrated hostility toward arbitration of disputes generally and impeded efficient resolution of disputes through arbitration, the latest wave of decisions evince hostility toward "arbitrability" clauses and toward efficient, arbitrated resolution of arbitrability disputes. *See, e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 521 (2000) (the FAA's "purpose" was "'to reverse the longstanding judicial hostility to arbitration agreements'"), *citing Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).[10]

Commentators have observed that "[t]his judicial regulation of arbitration agreements increases the dispute-resolution costs of the businesses with which consumers deal," and "this cost-increase, in turn, raises the prices consumers pay." Steven J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (2001). Further, these rulings are based on flawed reasoning, which fails to give effect to both the express ruling in *First Options*, and this Court's approach in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that has guided arbitrability jurisprudence for almost 35 years.

It is common ground that the validity of an "arbitrability" clause (granting the arbitrators the authority to decide if the other terms of the arbitration agreement are valid) itself may be challenged on grounds such as unconscionability, fraud in the

---

[10] The Court has also stressed that "generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants and as such, they are far out of step with our current endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30.

inducement, duress, or other "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. This follows the Federal Arbitration Act's requirement that arbitration agreements shall be valid and enforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1999).

However, the next question is whether (a) an "arbitrability" clause embedded within an arbitration agreement may be invalidated by a court on grounds that the arbitration agreement as a whole is unconscionable, or (b) the court may only adjudicate whether the "arbitrability" clause is unconscionable on its own. The court below, along with like-minded courts, have not addressed this question. They simply assumed that "arbitrability" clauses may be ignored when the overall arbitration agreement is found by the court to be "unconscionable." This approach, however, strips the "arbitrability" clause of force because it vests the arbitrability decision in the courts in *every* case where the validity of an arbitration agreement is challenged.

The proper approach is for courts to address challenges to an "arbitrability" clause, embedded within an arbitration agreement, by determining only if such clauses themselves are unconscionable or otherwise invalid. This is the only approach consistent with *First Options* and general arbitrability principles set forth in *Prima Paint*. In *Prima Paint*, the Court ruled that *courts* may adjudicate "only issues relating to the making and performance of the agreement to arbitrate," such as claims that an arbitration clause was induced by fraud, but may not consider claims of fraud in the inducement of the contract generally. 388 U.S. at 403-04. The Court explained that arbitration agreements are "'separable' from the contracts in which they are embedded," and that where no claim is made that fraud was directed to the arbitration clause itself, "a broad

arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402.

The *Prima Paint* ruling was guided by the Second Circuit's earlier decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960), which viewed arbitration clauses as separable contracts. *See Prima Paint*, 388 U.S. at 399. The Second Circuit reasoned that "arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, i.e. a speedy and relatively inexpensive trial before commercial specialists." 271 F.2d at 410. To the same effect, an "arbitrability" clause is nothing more than an agreement to arbitrate the single issue of arbitrability, contained within a more general agreement to arbitrate other disputes. It is "separable" from the general arbitration agreement in which it is "embedded," and should be subject to court review only on grounds that would render the "separable" contract invalid under state law. If the "mere cry" that the general arbitration agreement is unconscionable is sufficient to avoid the arbitrability clause, this too "would permit the frustration of the very purposes sought to be achieved" by such a clause, namely the efficient resolution of arbitrability disputes.

In the decision below, the Alabama Supreme Court never asked whether the "arbitrability" clause was invalid or unconscionable on its own. It did not find that any of the elements of unconscionability applied to the "arbitrability" clause itself. For example, there was no evidence cited that the clause was "unreasonably favorable" to the lender, or that an "arbitrability" clause by itself was inherently "oppressive" or "one-sided." (App. 21a.) Nor did the court below even employ

its own newly-announced "prevalence" test – there was no allegation, evidence, or any finding that all lenders included "arbitrability" clauses in their form contracts. There is no more reason to believe that arbitrators will enforce the law of "unconscionability" any less ably, or fairly, than other matters of substantive law affecting important statutory and common-law rights of consumers. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995) ("Congress, when enacting this law, had the needs of consumers, as well as others in mind," and "arbitration's advantages often would seem helpful to individuals"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("there is no reason to assume at the outset that arbitrators will not follow the law").

In sum, the Court's ruling in *First Options* has been widely misapplied. Unless an "arbitrability" clause itself is judicially determined to be unconscionable or otherwise invalid, the arbitrators should be the ones to decide if other aspects of the arbitration agreement are unconscionable or invalid.[11] The Court should review this case in order to address the tide of contrary rulings that are inconsistent with this Court's rulings, and which generate protracted judicial disputes over the validity of arbitration agreements notwithstanding "clear and unmistakable" contract language that forecloses such a judicial role. Review is especially needed because time is proving that,

---

[11] Courts considering "unconscionability" of an arbitration clause have assumed it is the exclusive prerogative of the court to address: the issue relates to the "making" of the contract, a matter reserved for the court under section 4 of the FAA. This Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989), however, holds that rights under that Act – there the right to a court stay pending arbitration – may be varied or waived by agreement. The right to a judicial decision on the "making" of an arbitrability clause stands on no different footing and can be referred to arbitration by clear agreement of the parties.

as the number of standard form arbitration agreements signed by consumers and others continues to grow, so will the number of cases presenting unconscionability challenges to arbitration agreements.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for *certiorari*, and review the decision of the Alabama Supreme Court.

Respectfully submitted,

Stephen M. Truitt
Counsel of Record
Daniel I. Prywes
PEPPER HAMILTON LLP
600 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 220-1200

Stephen G. Harvey
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for *Amici Curiae*
American Financial Services Association,
American Bankers Association,
Consumers Bankers Association, and
The Financial Services Roundtable

Dated: August 28, 2001

(4)

No. 00-1934

Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

IN THE

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC., MERIT LIFE INSURANCE CO., and YOSEMITE INSURANCE COMPANY,

Petitioners

v.

MABLE BRANCH,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

ROBERT H. RUTHERFORD
F. A. FLOWERS, III*
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*

17pp

STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statements were set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to those Statements.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

I. Respondent Has Completely Misread This Court's Decision In *First Options of Chicago, Inc. v. Kaplan*. 1

II. There Is Substantial Conflict And Confusion Among The Federal And State Courts That Have Addressed The *First Options* Issue Presented By This Case. 2

III. Respondent Has Failed To Address The Argument That The Determinative Factor In The Decision By The Court Below To Invalidate The Parties' Arbitration Agreement Was The Prevalence Of Arbitration Agreements In The Marketplace. 4

IV. Respondent's Own Brief In Opposition Demonstrates That The Court Below Singled Out The Parties' Arbitration Agreement For Suspect Status In Violation Of The FAA Based On Lack Of Mutuality Of Remedy. ... 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: *Page(s)*

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5

Apollo Computer, Inc. v. Berg, 886 F.2d 469 (1st Cir. 1989) 3

Armendariz v. Foundation Health Pyschcare Servs., Inc., 24 Cal. 4th 83, 6 P.3d 669 (2000) 8

Arnold v. United Companies Lending Corp., 511 S.E.2d 854 (W. Va. 1998) 8

AT & T Tech., Inc. v. Communications Workers, 475 U.S. 643 (1986) 7

Berkley v. H & R Block Eastern Tax Serv., Inc., 30 S.W.3d 341 (Tenn. App. 2000), *review denied*, Nov. 6, 2000, *cert. denied*, 121 S. Ct. 1602 (2001) 2

Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707 (4th Cir. 2001) 8

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 6, 7

Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995) 8

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 1, 2, 3, 4

TABLE OF AUTHORITIES (continued)

Page(s)

Fleming Farms v. Dixie Ag Supply, Inc., 631 So. 2d 922 (Ala. 1994) 6

Gannon v. Circuit City Stores, Inc., __ F.3d __, No. 00-3243, 2001 WL 930550 (8th Cir. Aug. 17, 2001) 8

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 8, 9

Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) 8

In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571 (Tex. 1999) 2

Lloyd v. Service Corp. of Alabama, Inc., 453 So. 2d 735 (Ala. 1984) 6, 7

Marcrum v. Embry, 291 Ala. 400, 282 So. 2d 49 (1973) 7

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 3

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 5

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) 8

PaineWebber, Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996) 2

TABLE OF AUTHORITIES (continued)

Page(s)

Perry v. Thomas, 482 U.S. 483 (1987) 5, 6, 7

Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Tex. 2001) 2

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 3, 4

Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 8, 9

Sablosky v. Edward S. Gordon Co., 73 N.Y.2d 133, 535 N.E.2d 643 (1989) 8

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) .. 6

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 9

Showmethemoney Check Cashers, Inc. v. Williams, 342 Ark. 112, 27 S.W.3d 361 (2000) 8

Southland Corp. v. Keating, 465 U.S. 1 (1984) ... 6, 7

Southland Farms, Inc. v. Ciba-Geigy Corp., 575 So. 2d 1077 (Ala. 1991) 6

Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587 (7th Cir. 2001) 4

Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 3, 4

TABLE OF AUTHORITIES (continued)

Page(s)

Willis Flooring, Inc. v. Howard S. Lease Constr. Co., 656 P.2d 1184 (Alas. 1983) 8

Wilson Elec. Contractors, Inc. v. Minnottee Contracting Corp., 878 F.2d 167 (6th Cir. 1989) 8

United States Constitution:

U.S. Const. art. VI, cl. 2 6

Statutes:

9 U.S.C. § 2 7

Miscellaneous:

Restatement (Second) of Contracts § 363 (1981) .. 7

S. Rep. No. 536, 68th Cong., 1st Sess. (1924) 5

ARGUMENT IN REPLY

Respondent has engaged in all sorts of strained legal and logical gymnastics in an attempt to convince this Court that the questions presented for review by this case do not warrant consideration by the Court. Respondent's own Brief in Opposition, however, demonstrates that the questions presented are far from settled and that a decision by this Court resolving these issues is necessary.

I. Respondent Has Completely Misread This Court's Decision In *First Options of Chicago, Inc. v. Kaplan*.

Respondent's entire argument on the first question presented is totally undermined by her blatant misreading of this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Contrary to respondent's erroneous assertion, the issue before the Court was emphatically not "whether a court or an arbitrator should decide this dispute over the *scope* of the arbitration agreement." (Brief in Opp. 13) (emphasis added). This Court's opinion in *First Options* is clear that the Kaplans denied that "they agreed to arbitrate" at all. 514 U.S. at 942. The Court characterized this disagreement over the question whether a valid and enforceable arbitration agreement existed between the parties as one "about the *arbitrability* of the dispute." *Id.* (emphasis in original). Respondent is simply wrong in stating that the issue before the Court was whether a particular claim or dispute fell within "the scope of a presumptively valid arbitration clause." (Brief in Opp. 13).

The Court in *First Options* then considered the question whether the trial court or the arbitrator should decide "the arbitrability of the dispute" between the parties — whether a valid and enforceable arbitration agreement existed between them. 514 U.S. at 942. The Court held that the "parties may

agree to arbitrate arbitrability" when "there is clear and unmistakable evidence that they did so." 514 U.S. at 943-44. This is so, the Court explained, because the question whether the "parties agree[d] to submit the arbitrability question itself to arbitration," like other issues involving arbitration, "is simply a matter of contract between the parties" that depends upon whether "the parties objectively revealed an intent to submit the arbitrability issue to arbitration" in their agreement. *Id.* The parties clearly did so here. (*See* Pet. App. 3a). Indeed, the parties' agreement to "arbitrate all issues of arbitrability" is "inclusive, categorical, unconditional and unlimited." *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199-1200 (2d Cir. 1996).

II. There Is Substantial Conflict And Confusion Among The Federal And State Courts That Have Addressed The *First Options* Issue Presented By This Case.

Respondent asserts that no court has held that "parties must go to arbitration to find out whether or not they entered into a valid and enforceable arbitration agreement in the first place." (Brief in Opp. 15 n.4). Respondent is mistaken. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 n.3 (Tex. 1999) (holding that "whether the terms and conditions of an arbitration agreement are themselves unconscionable is a matter which must be submitted to the designated arbitrator"); *see also Berkley v. H & R Block Eastern Tax Serv., Inc.*, 30 S.W.3d 341, 344 (Tenn. App. 2000) (relying on *First Options* and holding that the parties agreed "to arbitrate the question of the validity and enforceability of the arbitration clause itself"), *review denied*, Nov. 6, 2000, *cert. denied*, 121 S. Ct. 1602 (2001). *Contra Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (holding that the issue of unconscionability of an arbitration

clause is always a question for the court). Which view is correct? Only this Court can provide a definitive answer.[1]

Relying on this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), respondent asserts that a court must always decide whether arbitration is proper. Respondent's reliance is misplaced because this Court expressly held in *Prima Paint* that the arbitrator, *not the court*, should decide the validity of the contract as a whole, which would necessarily include a determination by the *arbitrator* of the validity of the arbitration provision as a consequence. 388 U.S. at 404. Respondent's strained interpretation of *Prima Paint*, which did not involve a *First Options* clause, is also inconsistent with the "central purpose" of the FAA, which is "to ensure 'that private agreements to arbitrate are enforced according to their terms.' " *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), *quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).[2]

---

1. Respondent has also completely ignored the fact that the parties expressly incorporated into their arbitration agreement the Commercial Rules of the American Arbitration Association. (Pet. App. 3a). Rule 8 of the Commercial Rules grants the arbitrator the power to rule on, among other things, the "*validity* of the arbitration agreement." (R. 399) (emphasis added). In *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), the First Circuit held that the "parties contracted to submit issues of arbitrability to the arbitrator," including the "validity of the agreement to arbitrate" itself, when "the parties agreed that all disputes arising out of or in connection with their contract would be settled 'in accordance with the rules of arbitration of the International Chamber of Commerce.' " 886 F.2d at 472-73. The decision below is in direct conflict with the First Circuit's decision in *Apollo Computer, supra.*

2. While respondent emphasizes that her "unconscionability argument goes to the making and original validity of the asserted arbitration agreement" (Brief in Opp. 14), the "making" and

(Cont'd)

In sum, respondent, like Justice Lyons in his special concurrence on rehearing in the court below, argues that this case is controlled by this Court's decision in *Prima Paint*, *supra*, rather than *First Options*, *supra*. Five days after the petition was filed in this case, the Seventh Circuit, in an opinion by Judge Easterbrook, grappled with the interplay and proper application of *Prima Paint* and *First Options*. *See Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 590-92 (7th Cir. 2001) (rejecting an argument based on *Prima Paint* that "sits uneasily alongside *AT & T Technologies* and *First Options*" because it "disregard[ed] the principle that arbitration is contractual"). This tension between *Prima Paint* and *First Options* provides a solid reason for granting review in this case, for only this Court can clarify whether *Prima Paint* can be read to hold that the issue of unconscionability of an arbitration provision is always a question for the court even when a *First Options* clause is present.

III. Respondent Has Failed To Address The Argument That The Determinative Factor In The Decision By The Court Below To Invalidate The Parties' Arbitration Agreement Was The Prevalence Of Arbitration Agreements In The Marketplace.

Petitioners and respondent agree that the question whether respondent had any "meaningful choice" was, in the Alabama Supreme Court's view, outcome determinative. (*See* Pet. 18 n.7; Brief in Opp. 16). As respondent states, the court below in the *April Reaves* case enforced the identical arbitration agreement (with all its alleged defects) "against

---

(Cont'd)
"validity" of the arbitration agreement with respect to the Kaplans was also the issue in *First Options*, *supra*. 514 U.S. at 941-42. *See generally Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. at 478-79 (parties are generally free to structure their arbitration agreements as they see fit without violating § 4 of the Act).

another borrower who was shown to have greater choice as to arbitration at the time of her loans." (Brief in Opp. 16). Indeed, the other indicia of unconscionability discussed by the court applied equally to the *Reaves* case decided on the same day as *Branch*. But eight (8) of the nine (9) members of the court rejected the defense of unconscionability in *Reaves*. (Pet. App. 28a-29a). Respondent's own brief, therefore, refutes her position that the decision below on the unconscionability issue is fact-specific or fact-intensive, for the decision below turned solely on the "prevalence" of arbitration agreements in the marketplace.

Recognizing the fundamental flaw in her position, respondent has not even addressed petitioners' argument that the Alabama Supreme Court's views on the widespread use of arbitration agreements run headlong into Congress' objectives in enacting the FAA in the first place. Section 2 of the FAA " 'is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.' " *Perry v. Thomas*, 482 U.S. 483, 489 (1987), *quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In enacting the FAA, Congress "had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). *See generally* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike, . . . corporate interests [and] individuals"). As discussed in the petition, arbitration agreements have since flourished nationwide as a preferred method of resolving disputes. (Pet. 19-21).

The inescapable conclusion that the court below invalidated the parties' arbitration agreement precisely because other companies, without any input from petitioners, have accepted Congress' open invitation to use arbitration provisions in their contracts is clear from a comparison of

the court's holding in *Branch* and its holding in *Reaves*. The Alabama Supreme Court's use of the "prevalence" of arbitration agreements in the marketplace as the "primary indicium" of unconscionability (Pet. App. 25a), moreover, is in direct conflict with the FAA's liberal federal policy favoring arbitration agreements. As a result, the state law is preempted by the FAA and cannot stand. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Perry v. Thomas*, 482 U.S. at 491-92; *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). *See generally* U.S. Const. art. VI, cl. 2. Respondent, however, has dodged this argument entirely.

Respondent has also failed to rebut our argument that the Alabama Supreme Court's new unconscionability test did not "ar[i]se to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. at 492 n.9. Prior to its decision in this case, the court below had held that when a provision in a contract has become so "widely used and accepted in a particular trade," there is "a prima facie case that the usage is reasonable." *Fleming Farms v. Dixie Ag Supply, Inc.*, 631 So. 2d 922, 926 (Ala. 1994); *Southland Farms, Inc. v. Ciba-Geigy Corp.*, 575 So. 2d 1077, 1080 (Ala. 1991). In this case, on the other hand, the court applied the opposite presumption, declaring that the parties' arbitration agreement is unconscionable precisely because it was "widely used and accepted in a particular trade." (Pet. App. 26a-27a). The court's new test is preempted by the FAA because it "singl[es] out arbitration provisions for suspect status" in violation of Congress' mandate that the courts must place arbitration agreements " 'upon the same footing as other contracts.' " *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, *quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).[3]

---

3. The court's decision in *Lloyd v. Service Corp. of Alabama, Inc.*, 453 So. 2d 735 (Ala. 1984), does not alter this conclusion. (Cont'd)

IV. Respondent's Own Brief In Opposition Demonstrates That The Court Below Singled Out The Parties' Arbitration Agreement For Suspect Status In Violation Of The FAA Based On Lack Of Mutuality Of Remedy.

Under *general* principles of contract law in Alabama, mutuality of remedy is *not* a requirement for a valid and enforceable contract. *See, e.g., Marcrum v. Embry*, 291 Ala. 400, 403, 282 So. 2d 49, 51 (1973). *See generally Restatement (Second) of Contracts* § 363, Comment c (1981) ("the law does not require that the parties have similar remedies in case of breach"). The court held directly the opposite in this case. (Pet. App. 24-25). *Compare AT & T Tech., Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) (parties may exclude certain claims or issues from arbitration in their agreement). The court's decision is preempted by the FAA because it "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688, *quoting* 9 U.S.C. § 2.[4]

(Cont'd)

In *Lloyd*, the court held that "the enforcement of 'unbargained for' exculpatory clauses in residential leases [is] against the best interests of the citizens of Alabama and contrary to public policy." 453 So. 2d at 740. The court did "not hold that exculpatory clauses in residential leases are void *per se*" because of their widespread use in the marketplace. *Id.* at 741. And, while market prevalence may have been a "relevant" factor in *Lloyd* (Brief in Opp. 17), it was outcome determinative here. In any event, a state-law test of unconscionability based on widespread use of arbitration agreements must give way to the liberal federal policy favoring arbitration agreements embodied in the FAA as a matter of *federal* law. *See Perry v. Thomas*, 481 U.S. at 493; *Southland Corp. v. Keating*, 465 U.S. at 16-17.

4. Respondent correctly points out that the Arkansas, California and West Virginia state courts have held that lack of mutuality of

(Cont'd)

It is clear from the face of respondent's brief that her arguments, like the decision by the court below, constitute "generalized attacks on arbitration" that " 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), *quoting Rodriquez de Quijas v. Shearson/American*

(Cont'd)
remedy in an arbitration agreement governed by the FAA renders the provision either unconscionable or otherwise unenforceable. *See Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 121, 27 S.W.3d 361, 367 (2000); *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal. 4th 83, 118-19, 6 P.3d 669, 692-93 (2000); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 199[illegible] On the other hand, the Second, Third, Fourth and Sixth Circuits, as well as the courts of at least three states, have held that lack of mutuality of remedy in an arbitration agreement governed by the Act does not render the provision unconscionable or unenforceable. *See Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-83 (3d Cir. 1999); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-53 (2d Cir. 1995); *Wilson Elec. Contractors, Inc. v. Minnottee Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001); *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 137-39, 535 N.E.2d 643, 646-47 (1989); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, 656 P.2d 1184, 1185-86 (Alas. 1983). This is yet another issue regarding the proper application of the FAA that is far from settled.

Furthermore, the refusal of the court below to sever the alleged invalid cap on punitive damages in the parties' arbitration agreement pursuant to the agreement's severability clause (R. 96) is in conflict with the Eighth Circuit's decision in *Gannon v. Circuit City Stores, Inc.*, __ F.3d __, No. 00-3243, 2001 WL 930550 (8th Cir. Aug. 17, 2001). Only one of the cases cited by respondent involved an arbitration provision containing a cap on punitive damages and none of the provisions in the cases cited by respondent contained a severability clause. (*See* Brief in Opp. 20-21 n.7).

Express, Inc., 490 U.S. 477, 481 (1989). As such, respondent's arguments and the decision below are " 'far out of step with [this Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.' " *Gilmer, supra, quoting, Rodriquez de Quijas, supra. See generally Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("there is no reason to assume at the outset that arbitrators will not follow the law").

We have shown that this case raises important and recurring questions of federal law under the FAA and that there is substantial conflict and confusion among the federal and state courts that have addressed these issues. The Court should issue the writ because litigants, the federal and state trial courts, and the federal and state appellate courts, in the absence of a decision by this Court, will have to waste additional valuable time and resources briefing, debating and deciding the substantial questions presented herein.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. RUTHERFORD
F. A. FLOWERS, III*
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*